United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

1977

BRIEF OF APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,991

CURT BAMBERGER,

Appellant,

v.

RAMSEY CLARK, Attorney General
of the United States,

Appellee.

On Appeal From a Decision of the
United States District Court for the District of Columbia

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QUESTIONS PRESENTED

1. In the disposition of a debt claim under Section 34 of the Trading With the Enemy Act, can the Office of Alien Property, after twenty-one years of deliberation, diminish the admitted claim of an American creditor by 95 percent because of the intervening devaluation of German currency, when devaluation is applicable only if payment of this debt was to be made in Germany, and the terms of the debt and applicable German law provide that payment was to be in the United States?

2. In the disposition of a debt claim under Section 34 of the Trading With the Enemy Act, can the claim of an American creditor, whose value as of the date of vesting (in 1942) is admitted, be diminished by 95 percent after twenty-one years, because of the devaluation of German currency when the creditor's claim is specifically exempted, as a claim for damages against this debtor, from devaluation under German law?

3. In the disposition of a debt claim under Section 34 of the Trading With the Enemy Act, can the claim of an American creditor, whose value as of the date of vesting (in 1942) is admitted, be diminished 95 percent because of the intervening devaluation of German currency, when the creditor's claim for damages is largely for royalties, when royalty claims, too, are exempted from devaluation under German law?

4. Can the Office of Alien Property properly utilize the 1948 German Currency Reform Law as a means of depriving an American creditor of 95 percent of his statutory claim against vested assets, when the promulgators of that law did not intend that the law affect claims asserted against these assets, which were, in 1948, no longer German, but had become the property of the United States Government located in this country?

5. Did Congress intend that any confiscatory decree of a foreign legislature be utilized by the Office of Alien Property as a defense to the admitted claim of an American creditor against seized assets?

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction and venue are based on Section 34(f) of the Trading With the Enemy Act (50 U.S.C. App. 34(f)).

STATEMENT OF THE CASE

I.

This case is a unique one before this Court. The questions it poses have never been decided. In the case's unparalleled pendency of more than 21 years before the agency charged with dealing with it, it has no known precedent. Nor is there a chronicle of frustration quite like this Appellant's. This chronicle began in the late 1930's when the Appellant performed highly valuable scientific services for I. G. Farbenindustrie, A. G. — the largest German chemical combine and head of a worldwide chemical cartel (hereinafter "Farben"), for which he has never been paid. Our own Government, the statutory inheritor of Farben's debt when the Government seized Farben's assets in 1942, concedes not only the debt but its amount: the German equivalent of approximately $65,000 as of the date of seizure. In 1943 the Appellant filed his claim for this amount. Twenty-four years later our Government, on the bootstrap of its own delay and whatever advantage, lawful or otherwise, it could glean from events that intervened as a result of the delay, now flatly refuses to pay more than 6% of that amount, with interest for those 24 years commensurately reduced. To the Appellant this case represents a perverse triumph of time, bureaucracy and confusion over one man's rights.

II.

This is an appeal from orders of the United States District Court for the District of Columbia denying Appellant's motion for leave to adduce additional evidence and granting defendant's motion for summary judgment, and from a judgment of that Court affirming the determination of the Attorney General, as successor to the Alien Property Custodian,[1] in the matter of Appellant's debt claim under Section 34(a) of the Trading With the Enemy Act, 50 U.S.C. App. 34, dated January 26, 1965.

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[1] J.A. 48, 317.

The present suit arises wholly by virtue of Farben's breach of contract with the Appellant. The U. S. Government (through the Office of Alien Property, Department of Justice) became a party to these proceedings under the provisions of Section 34 of the Trading With the Enemy Act. Under that statute, assets seized by our Government from enemy firms during the War were made available for payment of their debts to American creditors. Farben's assets were so seized on March 15, 1942. They have always been, and are presently ample for the satisfaction of this claim. Appellant's contract with Farben has always been admitted by our Government in its administrative deliberation of Appellant's claim, review of which is being sought before this Court. Even more significantly, Farben's breach of this contract is admitted by our Government. All that has ever been in controversy in this litigation is the *extent* of our Government's liability in damages — as successor in interest to Farben under terms of Section 34 of the Trading With the Enemy Act — for Farben's breach of its contract with the Appellant. The Office of Alien Property ("OAP"), acting after 21-1/2 years of deliberation, wrested 95 percent of Appellant's claim from him. Review of this decision is sought by this Appeal.[2]

III.

The Appellant, Dr. Curt Bamberger, now 67 years old, was raised and educated in Germany, obtaining his Ph.D. in Chemistry from the University of Wuerzburg in 1923. From 1925 on he was employed as a professional research chemist by an affiliate of I. G. Farben. Appellant's specialty was the development of new industrial dyes, and several of his dyestuff formulations were patented and very profitably exploited by Farben, both in Germany and abroad.

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[2] Since the Court below, without opinion, simply affirmed the OAP's decision. (J.A. 316-317).

On August 18, 1931, Appellant entered into a contract with Farben[3] covering his employment as a chemical research scientist. This contract incorporated by reference the industry-wide provisions of the "Reich Collective Wage Agreement for University-Trained Employees of the Chemical Industry."[4] The employment contract was for the initial term of one year commencing November 1, 1931, but was to be deemed automatically renewed on a year-to-year basis unless terminated upon three months' notice.[5] The contract and the incorporated collective wage Agreement spelled out in detail the rights and obligations of the parties concerning patentable inventions, royalties, restraints on competition after termination of employment, and payment for these contractual obligations.

Subsequent to the accession to power of the National Socialists in January, 1933 and the increasing severity of their anti-Jewish measures, the position of Appellant, a Jew, became increasingly precarious. In 1935 he applied for a visa to emigrate to the United States,[6] and well prior to the last renewal term of his employment contract Farben knew that he wanted to emigrate to this country.[7] However, Farben regarded Appellant's scientific knowledge as so valuable that it threatened him with denunciation to the Nazi authorities if he made good his plans to leave.[8]

In September, 1938, in the wake of the Sudeten crisis, Farben locked out Appellant from his laboratory, but continued to forward his monthly salary to his home in Cologne.[9] During the next six months Nazi persecution reached a crescendo. By the beginning of 1939 every Jew remaining in Germany realized that he did so in peril of his life.

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[3] J. A. 50, 75, 231-245.

[4] J. A. 50, 75, 237.

[5] J. A. 50, 240.

[6] J. A. 298, 300.

[7] J. A. 298-99, 301.

[8] J. A. 298.

[9] J. A. 50.

By letter, on February 25, 1939, Farben informed the Appellant that his contract was terminated as of October 31, 1939.[10] In that same letter Farben stated to the Appellant that notwithstanding its own termination of the contract, Farben would insist that the Appellant perform his own contractual undertaking not to accept competitive employment for two years (subsequent to October 31, 1939). Farben insisted that this undertaking forbade Appellant from accepting such employment in Europe, North and South America, and other industrial areas, and in consideration therefor, Appellant would receive "Karenz" payments (payments in lieu of competitive employment) for that period.[11] Both the restraint against competitive employment throughout the world and the provision for Karenz payments are admittedly part of Appellant's contract with Farben.

Appellant escaped Germany to Brussels on February 28, 1939.[12] It should be noted that at the time that the Appellant fled Germany, the following items of compensation (in addition to future "Karenz" payments payable as noted above) were currently due the Appellant, as the Government admits:

1. payments of salary through October 31, 1939 — the date Farben chose as the termination date of Appellant's contract with it;

2. refunds of certain payments made by Appellant to Farben's retirement fund;

3. royalties on Appellant's patents which Farben was exploiting commercially[13] and which were calculable

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[10] This correspondence is summarized by the Government at J. A. 226.

[11] Farben's letter of 2/25/39 to Appellant. (J. A. 226).

[12] J. A. 51.

[13] In largest part, in the United States, since Appellant had assigned his U.S. patents, under Farben's orders, to General Aniline and Film Corp., Farben's U. S. subsidiary. (J.A. 102, 103, 104, 112).

> and payable pursuant to the Reich Collective Wage Agreement for University-Trained Employees of the Chemical Industry, specifically made a part of Appellant's contract with Farben.

The total amount owed by Farben as of March 15, 1942 — the day that Farben's assets were seized in the United States (and when Plaintiff's claim under Section 34 of the Trading With the Enemy Act became fixed) is stipulated to by the Government: 160,637.92 Reichsmarks.[14] As will be shown, the Appellant never received what was owed him.

In April of 1939 Appellant attempted to enforce Farben's admitted obligation to pay him the amounts due him. Farben, however, by letter to Appellant at Brussels dated April 13, 1939,[15] took the position that although the Appellant's obligation (preventing him from accepting competitive employment) was world-wide in scope, Farben, on its part, could make no payment to Appellant outside of Germany, but would pay him only in Reichsmarks in Germany, and even this payment would be made only if the Nazi Foreign Exchange Control Office ("Devisenstelle") licensed this payment. By letter to Appellant on May 12, 1939, Farben[16] reiterated that it could not make payment to the Appellant outside of Germany because of Foreign Exchange controls; but Farben continued to insist on Appellant's forbearance from employment wherever *he* happened to be. Finally, on May 26, 1939,[17] Farben, after having informed Appellant on April 13 and May 12 that the Nazi Devisenstelle would not permit payment to him outside of Germany, reported to Appellant the discovery that its attempts to secure a license for such payments were — as had been predicted — failing. The May 26 letter again informed the Appellant that his contractual obligation was very much alive (and he was to

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[14] J. A. 59, referring to J. A. 53-54.

[15] J. A. 227.

[16] J. A. 228-229.

[17] J. A. 140-141.

be bound by it across the world) but that Farben could make no payments to him except into a blocked account in Germany. No payments have been made to the Appellant from that day to this.

IV.

Following the Nazi invasion of the Low Countries on May 10, 1940, the Appellant was interned in a transient camp in Unoccupied France. He made his way to Marseilles, and was able to book passage aboard a freighter heading for New York. The freighter was intercepted and Appellant was detained for a number of months in Casablanca. Finally, on September 12, 1941, Appellant reached New York. Thereafter, he became a permanent resident of the United States, and achieved U.S. citizenship in 1947.[18] Appellant's eligibility to press his claim under Section 34 is admitted.

Since 1947 Appellant has continued his professional activity as a research chemist in the United States.

Farben's assets in the United States were vested on March 15, 1942. By settlement with Interhandel, a Swiss holding company which sued for recovery of these assets, the largest portion of these assets was sold and the bulk of the proceeds turned over to Interhandel. The remainder was segregated for use in satisfying claims such as this one or for satisfaction of other war claims. Thus, Appellant's claim may be satisfied in its entirety without recourse to the U.S. Treasury.

V.

Subsequent to the U.S. vesting of enemy-owned assets in this country, Appellant, twenty-four years ago,[19] filed his claim for

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[18] These facts are contained in Dr. Bamberger's testimony at hearing. (J. A. 105-107).

[19] On September 1, 1943. (J. A. 1-11).

amounts due him as a result of Farben's breaches of its contractual obligations. After *fifteen years*[20] of discussions and negotiations, first with the Alien Property Custodian and later with its successor, the Office of Alien Property, Appellant was finally notified in January 1962, that his claim would be allowed in the amount of *$2,907,* or approximately 4% of the principal sum of the claim in 1942 (without interest).[21] Since Appellant dissented, a hearing before the OAP Hearing Examiner was docketed.

During the OAP hearing the Appellant was not represented by counsel. Although he may have partially understood the meaning of *Die Deutsche Bank Filiale Nurnberg v. Humphrey,* 272 U.S. 517 (1926)[22] and the "Judgment Day" rule that came from it, he certainly did not understand that application of *that* rule in *this* case made expert testimony on German law a vital part of his case.[23] As will be shown in the Argument hereafter, the devaluation of Appellant's entitlement turned — with but one exception — on points of German law. The sole evidence on German law was offered by the OAP's own witness, Dr. Magdalena Schoch. Unadvised by counsel, Appellant offered no expert on German law on his own behalf. The Appellant never quite became aware of the adversary nature of the administrative proceeding (the OAP Claims Unit bitterly pressed devaluation of Appellant's claim throughout) until the hearing had closed. As will be shown, Appellant's failure to understand the adversary nature of the agency proceeding was highly prejudicial to him.

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20 Since processing of the claim did not commence until 1947.

21 J. A. 315. The amount of Dr. Bamberger's claim as of this date is approximately $207,000, computed on the basis of a principal sum of $63,243.25 as of March 15, 1942 — the admitted Reichsmark amount, RM 160,637.92, converted to dollars at 39.37 cents per Reichsmark, the pre-war value of the Reichsmark as admitted by the Office of Alien Property (J.A. 96) — at 6% interest from the various dates of Farben's breaches.

22 Whose significance here is discussed, infra, pp.

23 See Appellant's affidavit below dated November 30, 1966, filed in the Court below, in which he states why it was he did not have counsel or witnesses in a proceeding which he totally misunderstood. (J. A. 282-284).

Six months after the hearing record was closed and the briefs filed, Appellant finally became aware that this adjudication of his claim was really a thoroughly adversary proceeding and he secured counsel. His counsel filed a supplemental brief to the Hearing Examiner for the first time propounding points of German law on behalf of Appellant. Appellant's acknowledged adversary, the Claims Unit of OAP, in response, denounced Appellant's presentation of points of German law on the ground that his counsel had not qualified as an expert.[24] Nonetheless, a year after the close of the hearing record, the Claims Unit submitted *ex parte* further sworn testimony from its own Dr. Schoch.[25]

The Hearing Examiner followed Dr. Schoch's testimony completely and relied heavily on her belated *ex parte* submission. His Recommended Decision granted Appellant $3,916 (approximately 4% of Appellant's stated claim), plus 4-1/2 years interest at 4%. Exceptions were timely filed. Again, the Claims Unit opposed consideration of all views on foreign law save its own.[26] The Deputy Director of the OAP rendered the final substantive decision in this case on January 25, 1965. (This Decision is actually the decision before this Court on review since the Court below simply affirmed it without opinion.) The Deputy Director's decision agreed that Farben was indebted to the Appellant in an amount equal to 160,637.92 Reichsmarks, as follows:

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[24] Brief of Claims Unit (J. A. 26, Fn. 1).

[25] J. A. 62-73.

[26] J. A. 47A.

Salary at RM 750 per month March 1, 1939 - October 31, 1939	RM 6,000.00
Karenz (restraint on competition) compensation at RM 9,000 per year, November 1, 1939 - October 31, 1941	18,000.00
Confiscated pension fund payments	5,135.95
Special compensation pre-1938 exploitation of claimant's inventions	24,000.00
Special compensation for exploitation, beginning 1/1/38, of claimant's invention Alizarine Light Gray BBLW	19,978.75
Special compensation for exploitation beginning 1/1/38, of claimant's other inventions	87,523.22
Total -	RM160,637.92 [27]

The Deputy Director's opinion also, for the first time, conceded that Farben was in default in its contract with the Appellant. It did so by specifically awarding the Appellant interest on the entire amount due him,[28] and, in so doing, acknowledged (as Appellant had contended) that Farben was in default under its contract.[29] There remains, however, a dispute between the Appellant and the OAP on the crucial legal significance, wholly apart from interest, of this conceded default. Although the Claims Unit conceded[30] that prior to June, 1941 the Reichsmark was valued at 39.37 cents[31] (and thus the dollar equivalent of the Reichsmark principal sum awarded to the Appellant would amount to $63,243.25),

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[27] From the Recommended Decision of the Hearing Examiner, adopted by the Deputy Director. (J.A. 292).

[28] Commencing and terminating, however, on dates disputed by the Appellant.

[29] J.A. 306.

[30] See discussion, infra, pp.

[31] J.A. 96.

he nonetheless awarded the Appellant $4,016,[32] or only approximately 1/16 of Appellant's claim at its pre-war dollar value, plus interest computed from certain median dates of Farben's defaults at the rate of 4% per annum. In so doing, he relied wholly on the devaluation of German currency under the 1948 German Currency Reform Law.[33]

The Court below affirmed the Deputy Director's decision without opinion. The Court below also refused Appellant leave[34] to adduce the additional testimony on German law from an expert proffered by him, Werner Galleski, Esq. In light of the cloud thrown over the unsworn arguments of Appellant's counsel during the agency hearing and the District Court's refusal to accept his proffer, it is probable that Appellant, in all the years of his quest for a just determination of his claim, has never had his day in Court upon the difficult and complex questions of German law that are dispositive of this case.

Review of the Deputy Director's opinion and of its affirmance, without opinion, by the Court below are sought before this Court.

STATUTES AND REGULATIONS

1) Fed. Rules Civ. Proc., Rule 44.1, 28 U.S.C.

> "A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The Court's determination shall be treated as a ruling on a question of law."

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[32] J.A. 313.

[33] Hereinafter so cited in reference to Military Government Law No. 63, Third Law For Monetary Reform (Conversion Law), issued June 27, 1948, appearing in 13 Fed. Reg. 4971-4978 et seq. (August 26, 1948); see J.A. A2-A9.

[34] As Section 34(f) of the Act permits.

2) Pertinent portions of 50 U.S.C. App. 34 (Trading With the Enemy Act) appear in the Appendix hereto.

3) Pertinent portions of the Sections of the German Civil Code ("B.G.B."), in translation, and the 1948 German Currency Reform Law cited in the Brief appear in the Appendix to the Joint Appendix.

STATEMENT OF POINTS

1. The decision of the Office of Alien Property rests on a series of mistaken interpretations of German law. The basis for the Deputy Director's decision is as follows:[35] He found that the Appellant did indeed have a contract with Farben, and that payments under this contract were past due and owing the Appellant as of March 15, 1942, the date of the vesting of Farben's assets.[36] That sum was 160,637.92 Reichsmarks — an amount stipulated by both parties. But in order to translate this sum into dollars for his award, the Deputy Director reached the following legal conclusions, *seriatim,* each of which is manifestly erroneous under German law:

a. That the place of performance of all obligations of Appellant's contract with Farben was Germany and only Germany;

b. That, accordingly, under the "Judgment Day" rule pronounced by *Die Deutsche Bank Filiale Nurnberg v.*

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[35] Also the basis for the decision of the Court below since that Court affirmed the Deputy Director without opinion.

[36] The Deputy Director's opinion containing these findings and conclusions is found at J.A. 303-313.

Humphrey, supra,[37] brought into play by the preceding conclusion as to the contemplated place of performance under this contract, conversion to dollars must be made as of the date of "Judgment," not the date of Farben's breach;

c. That such conversion (as of January 1965, the date of the Deputy Director's decision, viz., the "Judgment Day") must be controlled by the Germany Currency Reform Law of 1948; and

d. That under the 1948 law, as the Deputy Director interprets it, Appellant's entitlement in 1942 Reichsmarks must be devaluated 16-1[38] into Deutschmarks and the Deutschmarks then converted into dollars; and

e. Separately, the Deputy Director found that Farben was in default under its contract with Appellant when it refused to make payments to the Appellant. Appellant does not dispute this determination but refutes the ultimate conclusion of the Deputy Director that Appellant's

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37 Where, in a 5-4 split, the Supreme Court decided that where a debt was payable to the creditor solely in German currency, and payable solely in Germany, the debt's conversion to dollars would be at the rate in effect on the date of the Court's judgment. This contrasts with the rule of a unanimous Court in Hicks v. Guiness, 269 U.S. 71 (1925), which held that if the foreign country debt were payable in the United States, it would be converted at the rate in effect on the date of breach; Section 423 of the Restatement, Conflict of Laws views this latter rule as applying where "damages for breach of a contract to deliver money not currency of the state where the delivery is to be made" . . . shall be paid "at the rate of exchange current at the time of the breach." By either of said ambits, Appellant's 160,637.91 RM would be converted to dollars at the pre-1942 rate, or approximately 40 cents per RM (amounting to approximately $65,000). Only if the first, or "Judgment Day" rule applies, does the 1948 German Currency Reform Law intervene (since the "Judgment Day" would presumably be the date of the Deputy Director's decision, January, 1965) and its 16-1 devaluation to Deutschmarks apply.

38 Notwithstanding the RM 10-DM 1 ratio set forth in the German Currency Reform Law of 1948; immediately upon creation of the Deutschmark it acquired a market value of approximately $ .25 and has stayed firm since. Thus, illustratively, RM 10, worth $4.00 pre-war, became DM 1, worth only $ .25.

claim must be devaluated 16-to-1 since Farben's default necessarily gives rise to a damage claim on the part of Appellant which is exempted from devaluation under the 1948 German Currency Reform Law.[39]

2. No issues of fact or agency expertise are involved in this Appeal. No attempt is made herein to attack any of the Deputy Director's findings of fact. At the same time, the Trading With the Enemy Act vests no special expertise in matters of foreign law in the Deputy Director. His conclusions on foreign law are wholly reviewable to determine if they are erroneous. Appellant submits that the decision of the Deputy Director is manifestly erroneous as a matter of German law. Its errors spring inexorably from the Deputy Director's own admissions, found in his opinion. With these admitted conclusions as a premise, the unanimous expert opinions on German law found in the record (together with what the Court may adduce under Fed. Rules Civ. Proc. Rule 44.1, 28 U.S.C.) require reversal of the Deputy Director's ultimate determination to devaluate the Appellant's claim 16-to-1 under the 1948 German Currency Reform Law.

SUMMARY OF ARGUMENT

1) The decision of the Deputy Director is manifestly erroneous as a matter of German law. German law requires a fair and equitable interpretation of a contract where it is silent as to the important provisions. Any such interpretation of Appellant's contract with Farben compels the conclusion that performance outside of Germany by both Farben and Appellant of the crucial obligations under this contract was contemplated by the parties.

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[39] Accordingly, interest at 4% was awarded the Appellant on all sums, with the running of interest suspended during certain periods excluded by the Deputy Director. The interest, of course, was subject to the same devaluation as the principal sum, no matter what the period for which it was awarded.

a) The locus of performance determines which rule applies: the "Judgment Day" rule and devaluation, or the "Breach Day" rule and fair value.

b) The contract is silent as to where Farben was to pay these post-termination obligations.

c) Related terms of the contract make it clear that its crucial post-termination provisions were to be performed outside of Germany.

d) Appellant's proffered expert on German law, viewing these contractual provisions, found that Farben's performance was intended to be in the United States.

e) The Government wholly ignored these post-termination obligations.

f) German law did not contemplate the Appellant to sacrifice his life in order to be paid what he was owed.

g) Farben itself conceded it was under an obligation to make payment abroad. Its conduct totally refutes our Government's contention.

2) The decision of the Deputy Director is manifestly erroneous since, under German law, Appellant is entitled to damages for breach of contract which include whatever economic loss he might suffer as a result of the 1948 devaluation.

a) The Deputy Director has admitted a default by Farben.

b) All expert witnesses agree that damages consequent on a default cannot be devalued under the 1948 German Currency Reform Law. On the contrary, a default prior to 1948 entitles the debtor to damages including any losses resulting from devaluation under that Law.

3) The decision of the Deputy Director is manifestly erroneous as a matter of German law. Assuming, arguendo, he is correct on every other contention, the bulk of Appellant's entitlement is in the form of royalties based on Farben's commercial exploitation of his patents. These royalties are specifically exempted from the 1948 German Currency Reform Law. Further, equitable considerations under German law buttress the exemption of these royalties from devaluation.

a) The 1948 Law, as interpreted, exempts the royalties from devaluation.

b) Entirely separate rules of German Equity, drawing on terms of the underlying contract in this case, would exempt these royalties from devaluation.

4) The decision of the Deputy Director is manifestly erroneous as a matter of German law. Assuming, arguendo, he is correct on every other contention, it was never the intent of the German law to have it applied against an American claim against assets no longer (after 1942) German at all, but the property of the U. S. Government located in the U.S. Indeed, the interposition in a Section 34 action (by the Office of Alien Property) as a defense based on a foreign enactment whose effect is confiscatory was never intended by the Congress.

a) The history of the 1948 German Currency Reform Law makes it clear that it was never intended to have it applied against an American claim against assets no longer (after 1942) German at all, but the property of the U.S. Government located in the U.S.

b) Nothing in the provisions of Section 34 of the Trading With the Enemy Act concerning the availability of defenses under German law requires the recognition of the devaluation by this Court. The devaluation of Appellant's claim is clearly erroneous in that it is beyond

the defenses allowed by the Act and contrary to the public policy of the United States.

5) The OAP's decision in this case is wholly inconsistent with the most recent judicial determinations under Section 34.

a) The facts herein parallel *Aratani v. Kennedy* (C.A.D.C., 1963), 317 F.2d 161; the judicially approved settlement in that case returned to the claimants sums converted to dollars at the pre-war rate.

b) The Supreme Court's most recent view of the matter conflicts with the OAP decision herein. *Honda v. Clark,* 386 U.S. 484 (1967).

ARGUMENT

I. The Decision of the Deputy Director Is Manifestly Erroneous as a Matter of German Law. German Law Requires a Fair and Equitable Interpretation of a Contract Where It Is Silent as to Important Provisions. Any Such Interpretation of Appellant's Contract with Farben Compels the Conclusion That Performance Outside of Germany by Both Farben and Appellant of the Crucial Obligations Under This Contract Was Contemplated by the Parties.

A. The locus of performance determines which rule applies: the "Judgment Day" rule and devaluation, or the "Breach Day" rule and fair value.

The "Judgment Day" rule stands as a threshold issue in this case. Under the 19th Century rationale articulated in *Die Deutsche Bank Filiale Nurnberg v. Humphrey, supra,* conversion of a foreign currency obligation into dollars at the "judgment day" rate (herein the post-1948 devalued rate) is the rule only when payment of this obligation was to be due in the foreign country having that particular currency. If, on the other hand, payment under the contract could be made outside of the foreign country

(whose currency is to be converted), and especially if payment was contemplated in the United States, the foreign currency obligation was to be converted into dollars at the "breach day" rate (herein, the pre-March, 1942, rate). *Hicks v. Guiness, supra.*

Applied to the facts of the present case, the threshold question involves close scrutiny of crucial obligations of both Dr. Bamberger and Farben. The contract between them set forth very specific obligations for both of the parties in a post-termination situation, as that in which Dr. Bamberger found himself after February 28, 1939. Were these to be performed solely in Germany, as the Government contends? Or were they to be performed wherever the Appellant was located, as Appellant contends? Only if the Government is correct is the 1948 German Currency Reform Law even relevant in this case. For only if these obligations were performable in Germany and Germany *alone,* is the "Judgment Day" rule applicable, devaluation an issue herein, and the Deputy Director's decision supportable.

B. The contract is silent as to where Farben was to pay these post-termination obligations.

The contract between the parties is absolutely silent as to where Farben was to make the payments to Appellant which are the subject of this lawsuit. The Government admits this.[40]

Therefore, any conclusions as to where these obligations were to be performed must come from construing the intention of the parties from whatever implications there might arise from other provisions of the contract and the principles of German law and equity used to interpret contracts where the parties have remained silent.

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[40] Transcript of Hearing before the OAP, Dr. Schoch's testimony (J.A. 77, 79).

C. Related terms of the contract make it clear that its crucial post-termination provisions were to be performed outside of Germany.

Let us examine the crucial obligations involved in the Dr. Bamberger-Farben contract:

1. Section 7 of the contract requires Dr. Bamberger not to divulge confidential trade information "in this country or abroad."[41]

2. Farben knew well that Dr. Bamberger intended to emigrate to the United States prior to its last renewal of the contract on November 1, 1938.[42] Thus, the implication that the restrictive covenant set out in the contract (against his employment by one of Farben's competitors)[43] was to be performed in the United States is manifest.

3. Under the specific terms of the contract, Appellant was obligated to refrain from competitive employment for two years following the termination of employment. Farben specifically made this restraint world-wide in scope.[44] Indeed, Farben was near-frenetic in the assertion and reiteration of this obligation in its letters in April and May of 1939[45] to Appellant *already residing outside of Germany*. With the contract otherwise silent on the locus of the parties' performance, the clear

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[41] J.A. 241.

[42] J.A. 301.

[43] Sections 7 and 8 (J.A. 241).

[44] "Under the Collective Agreement for University Trained Employees in the Chemical Industry you are under an obligation for two years to keep secret your knowledge and experience gained during your employment and not to take any comparable position in any enterprise producing or distributing Alizarine dyes in Europe, North, South and Central America, British and French dominions, colonies, protectorates, etc." (J.A. 226). Dr. Schoch (the Government witness') translation of Farben's communication to Dr. Bamberger, dated February 25, 1939, in which Dr. Bamberger was terminated by Farben.

[45] J.A. 227, 228-229.

language setting the geographic scope of the restraint on Dr. Bamberger raises a powerful implication that the parties contemplated the performance of *this* portion of the contract outside of Germany.

Farben's corresponding post-termination obligations to the Appellant were two-fold: first, Farben was obligated to make "Karenz" payments for the same two year period. These payments were to compensate the Appellant for his two year forbearance from competitive employment. Second, Farben was obligated to continue its payments of royalties to the Appellant (based on Farben's commercial utilization of Appellant's patents) during the life of Appellant's patents, regardless of the termination of his employment.[46] The Government concedes that Farben was so obligated under Appellant's contract.

D. Appellant's proffered expert on German law, viewing these contractual provisions, found that Farben's performance was intended to be in the United States.

Werner Galleski, Esquire, Appellant's expert on foreign law, (whose testimony was excluded by the District Court for unknown reasons) made a painstaking analysis of the provisions of this contract under the controlling provisions of German law.[47] He addressed himself specifically to the post-termination obligations which are the crux of this controversy. His views were clear:

> ". . . it still remains the law under the aforequoted German statute, as explained by Palandt, [[48]] that

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[46] In addition, Farben was obligated to pay the Appellant his salary to the date of termination and return his payments to Farben's Retirement Fund. These lesser obligations are also admitted by the Government.

[47] J.A. 113-132.

[48] Palandt, Burgerliches Gesetzbuch (annual editions) — the leading commentary on German civil law.

> the achievement of the action to be taken in Germany was owed in the United States. Expressed in ordinary terms, this means that payment was due in the United States . . ." [49]

E. The Government wholly ignored these post-termination obligations.

Where does the Government contend these obligations were to be performed? The Government admits the contract itself says nothing. Its witness, Dr. Schoch, made no distinction between Farben's pre-termination obligation to pay salary and Farben's post-termination obligations. She wholly ignored and made no reference to the world-wide scope of Dr. Bamberger's post-termination obligations. She simply and flatly asserted:

> "I concluded in my testimony that Farben's obligation was to be performed at his place of business in Germany, and that the situation was not changed by the fact that Dr. Bamberger changed his residence." [50]

Based on this testimony from Dr. Schoch, OAP's Deputy Director ignored all distinctions between the contract's pre-termination and post-termination obligations and simply found that all contractual obligations were to be performed in Germany. Why was this so? Because the Deputy Director found — based on his own witness' testimony — that Appellant's compensation was stated in Reichsmarks and — in a curious statement:

> "no mention was made of any duties to be performed by the parties, or of payments to be made, outside Germany." [51]

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[49] J.A. 120.

[50] J.A. 71.

[51] J.A. 307-308.

As to the glaring error in the last statement, the Deputy Director simply glossed it over by the following fiat:

> "While the agreement not to work for a competing Company was implicitly to be effective wherever claimant happened to live, it fell far short of requiring performance and payment of compensation in the United States." [52]

F. Place of performance and the vital requirements of Section 242 of the German Code. Did that law contemplate the Appellant to sacrifice his life in order to be paid what he was owed? The Government's view:

Dr. Schoch made short shrift of Article 242 of the German Civil Code invoking "*clausula rebus sic stantibus*," or the change in situs of obligations if the circumstances between the parties change. She admitted that Section 242 provides that [53]

> "the creditor can demand a performance which corresponds to the change in circumstances if good faith and ordinary usage is required."

Where the contract itself makes no reference to the locus of performance (except to indicate that Dr. Bamberger's post-termination obligation was world-wide), Section 242 would seem to be a vital aid in construing what German law implied in these circumstances. But Dr. Schoch dismissed this section because she could find no cases in which a German Court "held that a *change in the creditor's residence* changed the place of performance from the debtor's residence or place of business — to that of the creditor's residence" (emphasis supplied). She simply overlooked the far greater change in circumstance on which Appellant relies:

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[52] J.A. 308.

[53] At p. 11 of the March 26, 1963 affidavit. (J.A. 72).

a change in residence caused by the same governmental persecution which would have cost Appellant his life had he returned to the debtor's (Farben's) place of business in 1939 to collect his debt.[54]

G. Which place of payment by Farben makes sense?

Which of these views makes sense, Dr. Schoch's or Mr. Galleski's? The silence of the contract on this point is the starting point in the search for the parties' intent. Both Dr. Schoch and the Deputy Director simply lumped together all of the obligations under this contract, no matter when they were to be performed.

The Government's view of these obligations is simply incredible. It has no contract language to rely on. Hence, under any rational view of this contract, can it make sense (as the Government contends) to require the Appellant to perform his commitment — comply with the restrictive covenants against him — all over the world and yet be paid for this forbearance *only* in Germany? After 1933 and the advent of Nazis, the Government's interpretation of these contract terms approaches fantasy. Is this contract to be interpreted (as the Government insists) as requiring the Appellant to be bound everywhere in the world and to be paid for his forbearance only in Germany where what was owed him was kept in blocked marks he could never unblock, and where he would be killed for his pains if he ever visited the alleged place of performance to collect his due? Absent specific language in his contract, is not the advent of

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[54] The OAP demonstrates remarkable inconsistency in the interpretation of these contracts. In the Matter of Ernest Frederick Siegel (Debt Claim No. 36151), the Director was willing to apply the "breach day" rule to the claim on the basis that "the debt was payable in Reichsmarks in this country, the place of claimant's residence, when each of the last six installments came due." The payments involved were payments for forbearance for competitive employment just as they are in this case. The mere fact of claimant's residence in the United States was enough for the OAP to invoke the "breach day" rule in Siegel. On the basis employed by the OAP in Siegel, Dr. Bamberger's entire claim should be converted to dollars under the "breach day" rule.

the Nazis precisely what Article 242 and *clausula rebus sic stantibus* really contemplates? This is especially true in the case of a Jewish scientist who is asked by Farben to forbear throughout the world, and who must look to Article 242 to provide a *quid pro quo* for his forbearance other than to force him to risk his life by returning to Germany in 1939 to get funds from Nazis.

Both our Government and this Court should view this contract in historical perspective. The U.S. Government, through its Office of Alien Property, has seen fit to remain entirely oblivious to conditions in Germany in 1939. It has defied history by stating that a Jewish scientist, in light of those times as we now know them, was obligated to return to Germany for money he could never receive if he was to be paid for duties concurrently carried out in good faith by him throughout the world. And he was required to return, even though his contract made no such requirement. No Equity, not even the Equity made a specific part of the German Civil Code in Section 242, will be allowed to aid this scientist — or so our Government insists.

This is a tragic denial of both law and history in which this Court must not share.

H. Farben itself conceded it was under an obligation to make payment abroad. Its conduct totally refutes our Government's contention.

Not even Farben believed in the travesty propounded by the OAP. In what is perhaps the most telling refutation of our own Government's position on this point, Farben made it quite clear that it was under an obligation to pay the Appellant after his termination, *wherever he was*. In April and May of 1939, Farben requested the Nazi Devisenstelle to allow it to make payments to the Appellant in Belgium. Why did Farben

make this request?[55] Was it out of magnanimity, generosity and compassion for the Jewish scientist? Hardly. This request was made for the sole reason that Farben was *required by its contract* to take whatever steps were necessary to make payment to the Appellant *wherever he was*, and Farben knew it and acted accordingly, albeit not in good faith. If the Appellant was located outside of Germany, Farben had to pay him there -- wherever he was. When the Government admits that Farben was under an obligation to make this attempt in good faith,[56] it is admitting that Farben's obligations extended beyond Germany's borders to Belgium in 1939, and to the United States, when the Appellant arrived here in 1941. Can this concession of Farben's extra-territorial obligations be anything except a full scale admission that Farben had to make payments outside of Germany?

Once admitted, this locus of payments throws out the "Judgment Day" rule, invokes the "breach day" rule, precludes devaluation and disposes of the crazy quilt of the Government's contentions on German law at the very threshold of this case.[57]

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[55] Whether this request was in good faith, as our Government concedes it had to be to preclude a Farben breach, is another issue. No one denies the unadorned fact of Farben's attempt. (J.A. 227, 228-229).

[56] To pay Dr. Bamberger outside of Germany, admittedly an obligation of Farben. See Dr. Schoch's testimony. (J.A. 79).

[57] Once it is established in this case that payment was to be made outside of Germany under the Dr. Bamberger-Farben contract, the OAP must be reversed. This is true no matter if Deutsche Bank, supra, and Hicks, supra, are read as invoking the "breach day" rule only if payment was required in the United States (as the Government interprets those holdings) or if they are read as requiring application of this rule (and consequent non-devaluation) if payment was required anywhere outside of Germany (as Appellant reads those cases). For in the present case if payment was contemplated outside Germany, it would have been in the United States at all times pertinent to this case. Appellant was a permanent resident in this country from September 1941. The date of vesting, when Appellant's rights under the Trading With the Enemy Act accrued, was March 15, 1942.

On this score the decision of OAP's Deputy Director is clearly erroneous as a matter of law, should be reversed and judgment entered for the Appellant in the full, undevalued amount of his claim.

II. The Decision of the Deputy Director Is Manifestly Erroneous Since, Under German Law, Appellant Is Entitled to Damages for Breach of Contract Which Include Whatever Economic Loss He Might Suffer As a Result of the 1948 Devaluation.

A. The Deputy Director has admitted a default by Farben.

Assuming, arguendo, that the place of payment by Farben was, post-termination, to be in Germany and Germany alone and consequently the "Judgment Day" rule applies, the 1948 German Currency Reform Law becomes relevant as the law of conversion of Reichsmarks to dollars in effect on the "Judgment Day".[58]

This case remains a simple case of breach of contract. It is clear from his own opinion that the Deputy Director found Farben in default of its obligations to Dr. Bamberger. This conclusion followed heated and significant controversy.

This controversy developed when Dr. Bamberger contended that from February 28, 1939, on, Farben was in default under its contract with him when it refused to pay him what was admittedly owed. The Claims Unit, however, took the singular position that Farben was willing and anxious to make payment to this refugee scientist abroad, that Farben had been in entirely good faith and *had committed no breach of contract*. Its position was that Farben's refusal to make payment to this refugee scientist abroad was caused by an ironically phrased inhibition: a "nondiscriminatory governmental decree"[59] of the Devisenstelle, the Nazi Foreign Funds Exchange Control Office, which refused

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[58] January 25, 1965, the date of the Deputy Director's decision.

[59] Statement of the Chief of the Claims Unit during hearing. (Tr. 57, J.A. 98).

to license this payment.[60] The Hearing Examiner accepted this story of impossibility. He found:

> "After Farben's letter of May 26, 1939, to the claimant, stating truthfully that its application for permission to make payments to him in a foreign country had been denied and that payment would be possible only into a blocked account in a German Devisenbank . . ." (Finding 14, J.A. 291).

And:

> "Under German law, a debtor who is in default is liable to his creditor for 4% interest on the debt as damages arising from the default. *A debtor is not in default, however, as long as his failure to pay is due to a circumstance for which he is not responsible. Farben's inability to obtain a license from the German Foreign Exchange Control was a circumstance for which Farben was not responsible; hence Farben was not in default until the license requirements were abolished on December 29, 1958."* (Emphasis supplied). (Finding 28, J.A. 293).

Dr. Bamberger raised specific exceptions to these findings of the Hearing Examiner:

> ". . . Claimant's claim herein has been for direct and proximate damages for Farben's (the debtor's) breach of contract." (Exception 1, J.A. 12).

> ". . . (Claimant excepts) to that portion of Finding No. 14 which holds that . . . Farben stated truthfully that his application for permission to make payments in a foreign country had been denied." (Exception 7, J.A. 14).

> ". . . (Claimant excepts) to the conclusions as to German law embodied in Finding 28, on page 9, on the grounds that they are contrary to controlling German law. . ." (Exception 12, J.A. 16).

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60 The irony of this description is set out by Mr. Galleski in his proffered affidavit (J.A. 116-117). He worked for the Devisenstelle before he fled Germany. According to him, what Farben wanted, Farben got (J.A. 117). Licenses to Jewish refugees abroad were something else again.

Thus, the controversy lay between default (as urged by Dr. Bamberger) and impossibility (as urged by the Claims Unit).

However, the Claims Unit "nondiscriminatory governmental decree" concept was simply too much for the Deputy Director to swallow. He found:

> "The Hearing Examiner's response to the claim for damages arising from Farben's failure to pay claimant when payments were due is found in the assessment of interest." [61]

The Hearing Examiner's response had been to *deny* interest because "Farben was not in default." (Finding 28, cited *supra*). In clear terms, the Deputy Director then reversed the Hearing Examiner:

> "Exception 7 is to that portion of Finding 14 stating that Farben had applied for a license to pay claimant, but the application had been denied. Contest about this factual issue would be significant if claimant did not prevail on the issue whether interest is due on his claim. Since I hold claimant entitled to interest according to German law on all portions of the debt owed him by Farben except for the portion which became due between June 14, 1941 and January 1, 1947, this factual issue loses its materiality, and the force of the exception is vitiated." [62]

In a subsequent portion of his opinion, the Deputy Director refused to accept Finding 28 of the Hearing Examiner [63] and awarded 4% interest to Dr. Bamberger on his claim, as described above. His finding of Farben's *default* and his rejection of the impossibility argument (based on the Nazis' "nondiscriminatory governmental decree") could not be clearer.

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[61] J.A. 303-304.

[62] J.A. 305.

[63] Where Farben was found by the Hearing Examiner to be free from default, supra. (J.A. 293).

B. All expert witnesses agree that damages consequent on a default cannot be devalued under the 1948 German Currency Reform Law. On the contrary, a default prior to 1948 entitles the debtor to damages including any losses resulting from devaluation under that law.

With the Deputy Director's finding of a default as a premise, there is no dispute between the experts as to the ultimate conclusion. Dr. Schoch made it clear that a damage claim resulting from such a default is not subject to devaluation:[64]

> "The amount of damages, on the other hand, is not subject to this conversion. The measure of damages is defined as follows in Sec. 249 of the Civil Code:
>
> > 'A person who is obliged to make compensation for damages shall bring about the conditions which would exist if the circumstances making him liable to compensate had not occurred. . .'
>
> "German Courts have established the rule that the Conversion law is inapplicable to damage claims because on the date of the conversion the amount of money necessary to make the claimant whole for the damage incurred was not a fixed amount. Accordingly, they have fixed damages in Deutsche Marks without resorting to conversion." [65]

It is little wonder that the Claims Unit fought so diligently to sustain its "nondiscriminatory governmental decree" theory of impossibility. For without it, the finding of Farben's default would inevitably give

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[64] In the ex parte affidavit of March 26, 1963. (J.A. 65-66).

[65] This damage claim, arising from a defaulted debt, is patently a claim ex contractu, or sounding in contract. This truism, normally unnecessary to repeat, must be emphasized because of the OAP's attempt in other cases to contort debt default claims into, mirabile dictu, tort claims! This slight of hand uniformly and notably has been unaccompanied by a single precedent, case, commentator, code or any other source of law. Singular as they have been, these acrobatics must be flagged for the Court at this juncture.

rise to a damage claim by Dr. Bamberger which its own witness declared non-devaluable.

In concurring with Dr. Schoch that damage claims resulting from a debtor's default are not tied to the devaluated Deutschemarks, Mr. Galleski pointed to the existence of:

> ". . . a long chain of decisions in German Courts, according to which Farben owes a value liability to pay so many units of any currency, as are required to make Plaintiff whole."[66]

This is the crux of the matter: A debtor in default as of the passage of the 1948 German Currency Reform Law was obligated to make payment to his creditor in an amount equivalent to make the creditor whole. The devaluation of the Reichsmark was inapplicable to such a damage claim, except in one important sense: *the creditor's loss occasioned by devaluation itself was to be compensated as an item of damage in adjudicating the damage claim.* Under Section 288 of the German Civil Code, such damages were in addition to, and supplementary to, interest. Thus, the Deputy Director's finding of a Farben default and his award of interest to Dr. Bamberger had the effect of excluding Dr. Bamberger's claim from devaluation and permitting him to claim damages necessary to make him whole in light of the lesser value of the devalued German currency, the Deutschmark. Mr. Galleski cites a decision of the highest Court of the Federal Republic of Germany for the proposition that damage claims were not to be devaluated 16-to-1.[67] The

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[66] J.A. 115.

[67] Bundesgerichtshof, Official Reports, Vol. 14, p. 212, cited by Mr. Galleski in his proffered affidavit. J.A. 115. None of the sections of the German Civil Code involved in this case (including those deemed applicable by the Government and those deemed applicable by the Appellant) was involved in Reissner v. Rogers (C.A.D.C., 1960), 267 F.2d 50, cert. den. 364 U.S. 816 (1961), the decision which was relied on by the Government below. Reissner's claim was not for damages for breach of contract, but for unjust enrichment based on quasi-contract. Those claims are governed by entirely separate sections of the German Civil Code (Sections 812, 818). Unfortunately for Mr. Reissner (and unlike the admitted non-devaluability of damage claims here), claims for unjust enrichment are subject to devaluation under the 1948 Act. This is only one of the various distinctions between Reissner and this case. The only real similarity between the two cases is that both claimants are Jewish scientists.

compensability of losses resulting from the lower value of the Deutschmark (where the debtor was in default in 1948 when the German Currency Reform Law was passed) is made clear by the commentaries issued by the Judges of the Reichsgericht and Bundesgericht (the German Supreme Court):

> "Default damages encompass disadvantages resulting from a money devaluation" (RG 107, 124, 128; RG JW 1938, 946 Nr.9 . . .) Also included are the conversion damages incurred through the currency reform of the year 1948. *If the money debtor was in default with his payment at the time of the currency reform, he is obliged to make good the damage suffered by the creditor through the latter's inability to invest the money in 'real values'."* (Emphasis supplied) [68]

In full accord is Palandt's authoritative commentary on the German Civil Code, *Bürgerliches Gesetzbuch,* 21st Revised Edition, 1962, Note 2(b) to Section 286, at p. 257.

These authorities make it clear that if Appellant's suit were being brought in a German Court today, his claim would not be subject to devaluation. He would be entitled to a sum in Deutschmarks which has the same economic value as the debt owed him in Reichsmarks when Farben defaulted, plus interest. In dollar terms, that sum was approximately $65,000 in 1942 [69] with interest running from the date of Farben default.

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[68] Reichsgericht and Bundesgericht, Commentary on the German Civil Code (11th Ed., 1960), Vol. 1, Part 2, Annotation No. 9 to Civil Code Section 286, p. 1091, cited in Germany as "BGB-RGRK".

[69] There is ample evidence in this record to establish a 40 cents value for the Reichsmark at all times pertinent to this suit, even though commercial intercourse between Germany and the United States was cut off at some of these times. See Transcript of hearing before the OAP. (Tr. 35, J.A. 96). The Deputy Director mentions this rate and inferentially concurs that it was the proper pre-war rate (Deputy Director's Findings, J.A. 312, approving Finding 22 of the Hearing Examiner, J.A. 253).

To this date, no tribunal has ever weighed the compelling legal consequences of the Deputy Director's finding of Farben's breach.[70] Viewed alongside the unanimous opinion of the experts in this record, the Deputy Director's finding is an admission by the Government that this Appellant is entitled to the full undevaluated value of the debt owed him when Farben defaulted, long before vesting. Taking the Deputy Director's findings on their face, and the testimony of the OAP's own witness, as corroborated by Mr. Galleski and all German texts,[71] the Appellant is entitled to a reversal of the OAP award and a judgment in the full value of his claim.

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[70] The Court below ignored it along with all other issues, without comment. One further commentary on the hearing in the District Court should be made. On February 21, 1967, the original Judge of the District Court who was to hear this case became ill during the preceding case and could not hear argument. The Clerk found a second Judge who determined he was unavailable. Finally, on the same morning, a third Judge was located and the argument proceeded. But, of course, the latter Judge had no opportunity to review the papers before argument. In a case of relative complexity such as this, the illuminating function of argument on the issues of German law was severely curtailed.

[71] Note an interesting judicial aside of 40 years ago that predicts the proper result in this case. Mr. Justice Holmes, while the Deutsche Bank case was sub judice, wrote his friend Sir Frederick Pollock of the complexities of the case. Pollock agreed with Holmes' judgment and reasoning and postulated a further element of German law, not assumed in the case: "Quaere, if German law allowed unliquidated damages to be recovered for the detention of a debt . . ." His own opinion was as follows: "In that case it might be said that the damages sued for could be calculated only in the currency of the jurisdiction" — meaning there, as here, that the consequences of fluctuation measured in the constant currency standard of the jurisdiction — dollars — are compensable as damages. 2 Holmes-Pollock Letters (1961 ed.) 190, 193.

III. The Decision of the Deputy Director Is Manifestly Erroneous as a Matter of German Law. Assuming, Arguendo, He Is Correct on Every Other Contention, the Bulk of Appellant's Entitlement Is in the Form of Royalties Based on Farben's Commercial Exploitation of His Patents. These Royalties Are Specifically Exempted From the 1948 German Currency Reform Law. Further, Equitable Considerations Under German Law Buttress the Exemption of These Royalties From Devaluation.

A. The 1948 German Currency Reform Law, as interpreted, exempts the royalties from devaluation.

It is stipulated between the parties that of the 160,637.92 Reichsmarks admittedly owed the Appellant by Farben on the date of vesting, some 131,502.92 were in the form of royalties on Appellant's patents. They included royalties on the U.S. exploitation of Dr. Bamberger's patents by General Aniline and Film, Farben's American subsidiary.[72] These royalties pose a special question under the 1948 German Currency Reform Law.

Royalties are exempted from devaluation under the 1948 act. Section 18 of the 1948 German Currency Reform Law entitled, "Special Provisions for Particular Reichsmark Obligations," exempts certain classes of obligations from its coverage.[73] Section 18(1)(iii) sets forth the exemption under which an accounting between co-venturers has been exempted:

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[72] J.A. 292.

[73] "(1) Notwithstanding the provisions of paragraph (p) of this section [which provides that "In principle, Reichsmark claims shall be so converted into Deutsche Mark claims that the debtor shall be obliged to pay to the creditor one Deutsche Mark for every ten Reichsmarks due"] the following Reichsmark obligations shall be so converted into Deutsche Marks that the debtor shall be obliged to pay one Deutsche Mark for every Reichsmark." (J.A. A4).

> "Obligations arising out of settlements between partners,[74] co-heirs, married persons, divorced persons, parents and children."

Throughout this entire proceeding it has been conceded that the Appellant was entitled to a certain percentage of Farben's net profits on the exploitation of Appellant's patents.[75] This percentage was set at 5% by the Hearing Examiner and affirmed by the Deputy Director. This participation as coventurers in the exploitation of Appellant's patents raises, under German law, a relationship which exempts the participants from the application of devaluation. Mr. Galleski notes that the partnership relationship (as it is used in subSection (iii), *supra)* is not restricted under German law to arrangements which are held out to the public as partnerships. The term "partner" is equally applicable to:

> "all arrangements of silent partnership whereunder the parties in effect distribute the economic results of some pooling of resources among themselves like partners."[76]

Moreover, for coventurers to be covered within the term "partner" there is no requirement that the participants be owners in common of the partnership property, nor partners in the legal sense. Mr. Galleski stresses the economic basis of the relationship, the attribute of pooling of resources as being the touchstone of the German concept of "partners". In so doing, he cites specific holdings of German High Courts which exempt from devaluation property which may not be owned in common, but which is common in an economic sense.

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[74] It is submitted that the proper translation from the German of this term is "coventurers", rather than "partners" as used in the Federal Register translation.

[75] J.A. 286, 292, 312.

[76] Citing Bundesgerichtshof Official Reports, Vol. 4, p. 364. (J.A. 129).

> ". . . In the said decision (Bundesgerichtshof Vol. 2, p. 270) this Senate has taken the position that the application of Section 18, par. 1, subdivision 3 of the Conversion Law, is not limited to distribution of property owned in common under property law but comprises also the distribution of any property which is common in an economic sense." [77]

It is not difficult to discern the basis for this exemption. Where one economic coventurer receives the benefits of the venture in undiluted economic values, it is simply inequitable to devaluate the claim of his coventurer for his pro rata share, even though the latter claim may not be technically an ownership claim but a claim *in personam* against his coventurer. The German commentaries have recognized this inequity as the basis for the exemption from devaluation:

> "The conversion 1:1 in the designated situations has obviously been prescribed for the reason that the claim can take the place of property assets which are not devaluated. . . but whose value is retained also after the monetary conversion. It shall be avoided that if a person interested in such property assets shall be prejudiced because his interest has the technical form of an *in personam* claim while the other participants keep the property values." [78]

B. Entirely separate rules of German Equity, drawing on terms of the underlying contract in this case, would exempt these royalties from devaluation.

The royalties involved in this case are closely linked with the so-called "Karenz" payments, which were the payments to be made to the Appellant in lieu of accepting competitive employment. Both were forms

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[77] J.A. 130, the Galleski affidavit, quoting from Lindemeier-Moering, Nachschlegewerk des Bundesgerichtshofes, 1950-1960 (1961), (Encyclopedia of Bundesgerichtshof decisions), No. 11, concerning Section 18, par. 1, subdivision 3 of the Conversion Law.

[78] Duden-Harmening, Waehrungsgestze (1949) (the leading German commentary of the 1948 Conversion Law), note on Section 18, cited by Mr. Galleski at J.A. 131.

of compensation payable after the contract's termination. The "Karenz" payments, by virtue of the precise language of Section 11(a) of the Reich Collective Agreement for University-Trained Employees of the Chemical Industry, were to be considered exempt from all currency fluctuation.[79] The parties thus evinced an intention that the price for an inventor's forbearance for two years was to be a fixed economic value, wholly insulated from the vagaries of inflation over the world. It is, however, not entirely clear from the contract whether this provision applies to the inventor's entire Special Compensation, which included royalties. Where this ambiguity exists, however slight, there is precedent[80] in German decisions for applying the currency stabilization clause to all payments which equitably fall within the same category as those clearly covered.[81]

It would be eminently fair to do so in this case. Farben was the recipient of 100 units of economic value as a result of the exploitation of Appellant's patents prior to March of 1942. All of the value that it received was utilized in undiluted form long before passage of the 1948 devaluation law. The Appellant held a contract entitling him to 5 units of that value. While Farben's benefits remained thus untouched, Appellant's share (if not exempted from devaluation) instantly dwindles from 5 units to 1/16 of 5 units. The exemption of Section 18(1)(iii), *supra*, was meant to forestall exactly this inequity.

If Appellant's claim is to be controlled by the 1948 German Currency Reform Law, all of its provisions must be applied to it. To date, none of the various tribunals before whom this case has been heard has

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79 J.A. 281.

80 Acting under the equitable provisions of Section 242 of the German Civil Code, cited, supra. (J.A. 9, A1).

81 Decision of the Reichsgericht dated November 28, 1923, Reichsgerichtshof Official Reports, Vol. 107, p. 400.

focused upon this patent exemption from devaluation affecting more than 80 percent of Appellant's claim. If, as Appellant contends, these royalties comprise the fruits of his life's work, Appellant is entitled to his day in some Court[82] before they are decimated. Consideration by this Court will lead, Appellant submits, to a determination that both the principal sum of 131,502.92 Reichsmarks, and the interest on this sum, are exempted from devaluation and should be converted into Deutschmarks on a one-to-one basis.

IV. The Decision of the Deputy Director Is Manifestly Erroneous as a Matter of German Law. Assuming, Arguendo, He Is Correct on Every Other Contention, It Was Never the Intent of the 1948 German Currency Reform Law to Have It Applied Against an American Claim Against Assets No Longer (after 1942) German at All, But the Property of the U. S. Government Located in the U. S. Indeed, the Interposition in a Section 34 Action (by the Office of Alien Property) of a Defense Based on a Foreign Enactment Whose Effect Is Confiscatory Was Never Intended by the Congress.

A. The history of the 1948 German Currency Reform Law makes it clear that it was never intended to have it applied against an American claim against assets no longer (after 1942) German at all, but the property of the U. S. Government located in the U. S.

Preceding sections of this argument refer this Court to the position of a German Court in order that it might properly determine how

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[82] The Government contended below that since this argument (as well as the one following) was not made before the OAP, it cannot be made in Court. But these arguments go to no facts, nor questions of agency discretion. They are pure questions of law. No question of exhaustion of remedies, or primary jurisdiction applies to such questions. Indeed, under Rule 44.1 of the Federal Rules of Civil Procedure, promulgated during the pendency of the case below, this Court is free to apply the proper, controlling rules of foreign law just as it would domestic law. Indeed, in light of the refusal of the Court below to accept the proffer of the Galleski affidavit, it is probable that this Court will give the first consideration anywhere to these matters. Appellant is entitled to his one day in Court on these pure questions of law.

the 1948 German Currency Reform Law would apply to the Appellant's claim. But was extra-territorial application of such legislation ever intended — either by the promulgators of the 1948 Act, or by Congress?

In the one view of this crucial question spread anywhere on this record, Mr. Galleski responds with a clear negative.[83] He claims there never was any intent on the part of either the U.S. military authorities (who first promulgated the 1948 German Currency Reform Law as an occupation measure) or the German Federal Republic, which ratified the law once sovereignty had been returned to it in 1952, to have this law applied as the OAP has applied it in this case. Mr. Galleski cites Chapter VIII, Article 2 of the 1952 Convention[84] on the Settlement of Matters Arising out of the War and Occupation (whose signatories were the U.S., Great Britain, France, and the Republic of Germany, and whose acceptance by West Germany was a precondition to the restoration of German sovereignty). That Treaty deals with the residual jurisdiction of the Federal German Republic to affect the former German assets seized during the war. Against a backdrop of Allied seizure and assumption of permanent ownership rights to these assets, the German Federal Republic, in the 1952 Convention, specifically agreed to take no legislative or administrative measures which were in conflict with the substantive provisions of Allied laws dealing with these assets. Whether this disclaimer of jurisdiction is limited (in the sense that it proscribed German legislative attempts inconsistent with Allied ownership of these assets and did nothing more) was answered by the highest Court of the German Federal Republic, the Bundesgerichtshof, in its decision dated January 29, 1953, *Official Reports* Vol. 8, p. 378, cited by Mr. Galleski in his affidavit.[85] There,

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[83] J.A. 117-122.

[84] Convention on Settlement of Matters Arising out of the War and Occupation, signed by the United Kingdom, the French Republic, the United States, and the Federal Republic of Germany, May 26, 1952 (TIAS 3425).

[85] J.A. 125.

as Mr. Galleski interprets the opinion, the Court held (in terms entirely pertinent to our inquiry into what a German Court would do to Dr. Bamberger's claim today):

> "[T]he German law applicable to the debt relationship between the Plaintiff and Farben must be ascertained as of May 8, 1945, and that no subsequent German legislation, be it by Military Government Law or through the subsequent processes of legislation in the Federal Republic, may exercise any influence upon the adjudication of such debt relationship as far as it relates to the distribution of German assets." [86]

Thus, the conflicts-of-laws problem for an American Court is a relatively simple one. Assuming our Government is correct in requiring an inquiry into German law to determine the extent of Dr. Bamberger's entitlement, this reference to German law would end with the rejection by the German Courts of any jurisdiction to determine (by any enactment after May 8, 1945) the nature of Dr. Bamberger's relation to Farben's seized assets. The view of this matter taken by the highest German Court is that Dr. Bamberger's entitlement to these former Farben assets must be fixed without regard to the 1948 German Currency Reform Law. This, then, is the German view of what was, and what was not, intended by the promulgators of the 1948 German act.

B. Nothing in the provision of Section 34 of the Trading With the Enemy Act concerning the availability of defenses under German law requires the recognition of the devaluation of Appellant's claim by this Court. The devaluation of Appellant's claim is clearly erroneous in that it is beyond the defenses allowed by the Act and contrary to the public policy of the United States.

Even though Section 34 of the Trading With the Enemy Act provides that —

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[86] Mr. Galleski's interpretation is found at J.A. 126.

> "any defense to the payment of such claims which would have been available to the debtor shall be available to the custodian. . ." —

the Courts must weigh the validity of any purported defense and its consistency with the public policy of the American forum. Consequently, should a *German* forum hold that the 1948 German currency devaluation extends to this case, traditional principles of fairness in our own constitutional system bar the automatic recognition of such a defense in an American court; moreover, since that statute, as applied to this case, is clearly confiscatory legislation, strong public policy of the United States makes its application clearly erroneous.

(It should be emphasized that this case is the first case, insofar as can be ascertained, in which the propriety of foreign devaluation *statutes* (as defenses to Section 34 actions) has ever been raised. In every other case under the Trading With the Enemy Act except one, devaluation arose because of the market fluctuation of foreign currency, not because of specific foreign legislative enactment. In *Reissner supra,* where the issue did figure in the decision, the question raised herein was neither briefed nor argued.)

Our courts do not give extra-territorial effect to confiscatory legislation enacted by foreign governments insofar as such legislation would purport to govern rights to property located in the United States. Thus, in *Zwack v. Kraus Bros. and Co.* (C.A. 2d, 1957), 237 F.2d 255, the Court of Appeals for the Second Circuit held as follows:

> "[I]t does not follow that Courts in this country must recognize Hungarian claims of title to property situated in this country or rights with respect to claims in this country which were acquired only by coercion practiced on the owners without substantial consideration. On the facts of this case, we think Judge Palmieri was right in his refusal to recognize the right to trade names so derived and in treating the plaintiffs as the equitable owners. The governing principles are set forth in (cases cited)." 237 F.2d at 261.

The same doctrine has been cited most recently in the case *Republic of Iraq v. First National City Bank* (S.D.N.Y., 1965), 241 F. Supp. 567, as the "federal law in this Circuit," where property in the United States of a deposed king was allowed to pass to his heirs over challenge by the revolutionary government of Iraq. See, also, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij* (C.A. 2d, 1954), 210 F.2d 375, modifying 173 F.2d 71 (C.A. 2d, 1949), where the Court of Appeals for the Second Circuit similarly refused to recognize as a defense to a refugee's claim against property here the assertion of its "lawful" expropriation by the Nazi regime. In substance, the doctrines of integrity and responsibility of American courts strongly expressed in the above-cited cases bear directly on the case at bar, in that where the public policy of the forum is offended by discriminatory action of a foreign government against a claimant in the United States, the courts of the forum are impelled not to apply foreign standards in the determination of rights to property within the jurisdiction of the forum. Every critical element of the foregoing proposition — situs of the property in the United States, the confiscatory nature of the legislation, and the strong public policy of the forum — militates against allowing devaluation as a defense in this case.[87]

It is clear that the situs of the property in question is within the United States, and that by virtue of the provisions of the Trading With

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[87] The opprobrious act of the Foreign Government in this case would be near full-scale confiscation of an American property right, so made by Act of Congress. It is to be distinguished from our Courts' mere recognition that the economic forces at work in a market reached a certain conversion rate on a certain day. The latter recognition, not involving an act of a foreign sovereign contrary to U.S. public policy, moved the Courts in all of the World War I cases, the World War II Japanese cases, indeed all cases except this one and Reissner. As Justice Holmes was careful to note: "An obligation in terms of the currency of the country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it." Die Deutsche Bank Filiale Nurnberg v. Humphrey, supra (272 U.S. at 519). Judicial aloofness from market fluctuations of foreign currencies is a far cry from the specific sanction of a decree confiscatory to this American claimant, asked of this Court by the OAP.

the Enemy Act, there is not, nor can there be, any interest on the part of the former enemy country — Germany — in its return. As such, the property is property in the United States, in which Germany has no interest requiring the deference of our courts.

Secondly, it is also clear that the consequence of the 1948 devaluation is confiscation in all essential respects. Confiscation has been defined in the following exact sense:

> "An act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government, though the proceeds may not, strictly speaking, be brought into its treasury." Ellenborough, L.J., in *Levin v. Allnut,* 15 East 267, 269, 104 Eng. Rep. R. 845, 846 (K.B. 1812).

There can be no significant difference between a legislative act which devalues a claim in the proportion of 16-to-1, as is the case here, and a virtually identical devaluation of 16-to-0, and our courts should not be blind to the basic identity of legislative action. It would be anomalous in the extreme if a confiscation of the property by an American citizen, prohibited by our Constitution were it undertaken by the Federal Government or a state, could be permitted to be done in collaboration with Allies, and subsequently ratified by Germany. Moreover, the element of specific and intentional discrimination implicit in a confiscation by a foreign government is no less present in the virtual cancellation of past debts payable to foreigners.[88] Contrast the stated purpose of the Trading With the Enemy Act — to make claimants whole, not to

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[88] Assume hypothetically that the Bamberger-Farben relationship had its locus within Germany, but within what is now East Germany. Assume further that the East German legislature, whose jurisdiction extends over the locus of the original debtor-creditor relationship, decreed that no American (or Englishman, or Frenchman or national of any non-Iron Curtain country) could assert a claim against a creditor company located within its jurisdiction based on any pre-war transaction. Would this defense to a Section 34 action be recognized in an American Court? And does this differ materially from the legislative act in the present West German case?

expose them first to attenuation and then to the strangulation of their claims,[89] which the application of the 1948 German law in this claim clearly achieves.

Thirdly, questions of outright confiscation aside, American Courts and legislatures have always expressed a public policy for preserving the real value of claims, in stark contrast to the consequence of devaluation for this claimant. See the leading article on the subject, Rashba, "Debts in Collapsed Foreign Currency," 54 *Yale Law Journal* 1 (1944), wherein the author recites extensive examples from our own history when the value of claims was preserved through periods of sudden and violent inflation as well as deflation, e.g., in colonial times (case-by-case "splitting the difference"), the post-Revolutionary period (enactment of statutes providing for schedules of settlement), and after the Civil War — when in both the North and the states of the former Confederacy, courts and legislatures adopted comprehensive as well as *ad hoc* solutions based upon the real value of consideration as the measure for awarding recoveries upon contract claims.

In determining the issue whether to recognize the German currency devaluation as a defense allowed by Section 34 of the Trading With the Enemy Act, this Court cannot be indifferent to its consequences on the rights of the claimant, and to the clear abhorrence of American jurisprudence to confiscation by devaluation. The decision to allow the application of German law to a claim against vested assets is a matter of comity in American courts, and conscience, precedent, and analogy all strongly suggest that this Court eschew, in this benchmark case, any confiscatory application of the 1948 legislation to this American creditor's admitted claim.

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89 As the House Committee on Judiciary said in its report on the Bill which created the post-war machinery: "The intention of the bill is to permit non-hostile persons, to whom the return of property would be authorized, to be placed in the same position they would have occupied but for the vesting of their property . . ." (emphasis supplied). House Committee on the Judiciary, Report 1269 on H.R. 4571, "To Amend the First War Powers Act of 1941," 79th Cong., 1st Sess., p. 2.

V. The OAP's Decision in This Case Is Wholly Inconsistent with the Most Recent Judicial Determinations Under Section 34.

A. The facts herein parallel *Aratani v. Kennedy*, (C.A.D.C., 1963) 317 F.2d 161; the judicially approved settlement in that case returned to the claimants sums converted to dollars at the pre-war rate.

It must be assumed that the Office of Alien Property discharges its public function with consistency and fairness and not as the relentless adversary oblivious to its own previous dispositions. In the recent litigation concerning the claimants against the vested assets of the Sumitomo and Yokahama banks, the various dispositions (both by the OAP and by *this* Court) bear heavily on the current view of the "Judgment Day" rule. In *Aratani*, the question posed to *this* Court was whether the depositors (who had received Certificates of Deposit in return for their deposits at the American branches of Japanese banks) were entitled to repayment in dollars. This Court examined the language in the Certificate[90] and declared that the overall transaction between the depositors and the bank made it clear that the depositors could elect to receive dollars back from the bank as well as yen in Japan. This Court's willingness to infer a dollar obligation from an overall transaction containing Certificate language quite inconsistent with the Court's conclusion is pertinent here. Other facts of the Aratani transaction parallel closely in the instant case. The debtor in the instant case (Farben) similarly earned dollars, from the American exploitation of Dr. Bamberger's patents assigned by Dr. Bamberger to Farben's U.S. subsidiary, General Aniline & Film.[91] Accordingly, if this Court gives to

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[90] In Aratani the Court found, "Had the named bank of deposit in Japan actually issued its 'yen certificate of deposit', the instrument in the Japanese language would provide for payment at maturity in yen upon surrender of the certificate to the bank in Japan. . . ." 317 F.2d at 162. (Emphasis supplied)

[91] J.A. 102, 103, 104, 112.

the debtor-creditor relationship in the instant case the same overall sounding it gave the *Aratani* Certificate, the American nexus of this debt must emerge. This is especially true in the light of the specific elements in the Farben-Bamberger contract pointing toward payment in the U.S., which appear at least as strong as the Certificate language in *Aratani*.[92]

Following this Court's ruling in *Aratani* (which did not favor the claimants ultimately because of the exchange date chosen by the Court), while the Claimants' petition for *certiorari* was pending in the Supreme Court, the litigation was settled with the claimants receiving the return of their deposits at the *pre-war, undevalued* rate, and judicially approved (D. C., 1964) at 228 F. Supp. 706. Thus, under facts strongly parallel to those of the instant case, the OAP satisfied a Section 34 claim at undevalued, pre-war rate, with judicial approval.

B. The Supreme Court's view of the Matter.
Honda v. Clark, 386 U.S. 484 (1967).

While the Supreme Court in *Honda v. Clark, supra,* dealt principally with the Statute of Limitations on Section 34 claims, its philosophy with regard to the administration of Section 34 is relevant here. The Court found that the statutory scheme permitted what was, in effect, an equitable tolling of the statutes on behalf of a vast number of claimants

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92 In Honda v. Clark, 386 U.S. 484 (1967), the Supreme Court sanctioned undevalued payment upon the following yen-payable Certificate language, where payment in Japan was explicit:

> "This is to certify that the sum of yen _____ has been submitted to our Head Office, Yokohama, to be placed in Fixed Deposit there in your name at _____ percent per annum for ____ months, maturing _____, subject to the conditions on the back hereof.
>
> "Both principal and interest are payable, when due, at our aforesaid Head Office, Yokohama, upon surrender of this Certificate, properly endorsed and/or sealed." (Emphasis supplied) 386 U.S. at 500.

who had not filed timely complaints for review. The size of the claims was of no matter because:

> "The Government has no interest in the fund except to enforce the primary Congressional mandate that bona fide creditors recover their due." 386 U.S. at 500.

As to what the Court felt was the creditor's due, the Court had further language. It quoted with approval the House and Senate reports on the statute:

> "'The Custodian has emphasized to the committee that he is anxious to satisfy the proper claims of creditors and the committee concurs in the view that there exists a strong moral obligation to satisfy them inasmuch as, but for the vesting of their debtor's property, they would *presumably have been able to pursue ordinary remedies against the debtors*'." quoting H.R. Rep. No. 2398, 79th Cong., 2d Sess. 10 (1946); S. Rep. No. 1839, 79th Cong., 2d Sess., 3-4 (1946) (Emphasis supplied) 386 U.S. at 501.

The Committee's reasoning (and the Court's) is compelling. Assuming that Dr. Bamberger had been able to pursue his ordinary remedies in American Courts against Farben's unseized assets in 1942, the result would have been the payment to him of full value on a debt whose existence and size -- in 1942 -- is wholly acknowledged. He would have received his approximately $65,000 then, not some twenty years later. And no one would have conceived of a 95 percent reduction. That is just what the Congress and the Supreme Court intended to be the result in cases such as this.

CONCLUSION

For the foregoing reasons -- the accumulation of error upon error of law -- the Appellant seeks the judgment of this Court to restore him to the position where he would be but for the passage of time, our Government's indifference, and then its errors. As indicated heretofore, it was the intention of Congress:

". . . to permit non-hostile persons to whom the return of property would be authorized to be placed in the *same position* they would have occupied but for the vesting of their property . . ." (Emphasis supplied). House Committee on the Judiciary Report on H.R. 4571, "To Amend the First War Powers Act of 1941", 79th Cong., 1st Sess., p. 2. (H. Rept. 1269).

Appellant, in seeking the conversion of his admitted claim to dollars at their real value, seeks no less than Congress ordained.

Respectfully submitted,

FISHER, SHARLITT & GELBAND

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APPENDIX

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50 U.S.C.A. App. 34 (Trading with the Enemy Act)

"(a) Claims allowable; defenses

Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act. . . and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act. . . Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act . . .; and those acquired by the Custodian. . ."

"Pro rata payments; notice; review; additional evidence; intervention; judgment"

"(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant was delivered, by hand, to Bruno A. Ristau, Esquire, U. S. Department of Justice, Washington, D. C., this 15th day of September, 1967.

/s/ Joseph H. Sharlitt

Joseph H. Sharlitt

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,991

CURT BAMBERGER, APPELLANT,

v.

RAMSEY CLARK, ATTORNEY GENERAL OF
THE UNITED STATES, AS SUCCESSOR TO THE
ALIEN PROPERTY CUSTODIAN, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWIN L. WEISL, JR.,
Assistant Attorney General,

DAVID G. BRESS,
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MORTON HOLLANDER,
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PETITION FOR REHEARING

The appellee, pursuant to Rule 26 of the Rules of this Court, respectfully petitions for a rehearing of this Court's decision and judgment dated January 30, 1968.

1. The last paragraph of this Court's opinion (slip opinion, p. 6) orders the cause "reversed and remanded to the district court with instructions to remand to the agency for disposition in accord with this opinion." But this action is a statutory review

proceeding under Section 34(e) of the Trading with the Emeny Act, 50 U.S.C. App. 34(e). And that Section provides in pertinent part that, upon review, "the [district] court shall enter judgment affirming, modifying or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due" (emphasis added). There is, thus, no provision in the Act for a remand by the district court to the administrative agency. We respectfully request, therefore, that the language " * * * with instructions to remand to the agency * * * " be deleted from the last paragraph of this Court's opinion.

2. With respect to another aspect of the case, the parties are irreconcilably divided as to the import of this Court's mandate, and we respectfully request a clarification, so as to assist the district court in promptly carrying out this Court's mandate and to obviate further appellate proceedings.

The difference in opinion results from this Court's holding (slip opinion, p. 6) that, on the authority of Hicks v. Guinness, 269 U.S. 71 (1925), " * * * the reichsmark debt was to be converted into dollars at

a 1941 rate of exchange."[1/] We believe that a clarification of this Court's opinion and mandate is warranted since this Court's holding has made prominent a circumstance which had not heretofore been significant:

The Court recites (slip opinion, pp. 2-3) that "The Alien Property Custodian determined that, as of 1942 (the date when the United States stepped into Farben's shoes), Farben owed appellant 160,637.92 reichsmarks under the various provisions of the contract." It is true that the Custodian concluded as a matter of law that "under the law of Germany, I.G. Farbenindustrie was, at the time of the vesting of its property in the United States, indebted to claimant in the principal sum of RM 160,637.92" (J.A. 313). This legal conclusion was required because Section 34(a) of the Act, 50 U.S.C. 34(a), authorizes the Custodian to allow only debt claims which were "due and owing at the time of * * * vesting * * * ." The Custodian's conclusion was predicated on an established administrative

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1/ The reference to the 1941 date is probably derived from one of appellant's contentions. See this Court's summary of the parties' arguments, slip opinion, p. 3.

interpretation of Section 34 that where a claimant establishes a continuous obligation to make periodic payments on the part of the pre-vesting obligor, the Custodian would treat such future liabilities, for purposes of debt claims, as "due and owing at the time of * * * vesting".[2/]

Here, the administrative decision, as well as the record before this Court, makes it amply clear that, as a factual matter, all of the principal sum allowed by the Custodian had not become payable at the time of the vesting of Farben's property in March of 1942. The recommended decision of the Departmental hearing examiner (J.A. 292) — adopted by the Custodian (J.A. 306, 309) — shows that of the total debt accepted, the sum of RM 54,741.60 was allowed as compensation for the exploitation by Farben of claimant's patents after June 14, 1941.[3/]

2/ In the Matter of Dorothy Krets Lehman, Decision of December 8, 1948, Debt Claim No. 3848 (alimony payments maturing after vesting date are a proper debt claim).

3/ Exhibit A, reproduced at J.A. 142-156, shows that the figure of RM 54,741.60 is broken down as follows (J.A. 156):

1941 -	RM 15,896.90	(shown in the exhibit as DM 1,589.69)
1942 -	17,299.90	(shown in the exhibit as DM 1,729.99)
1943 -	12,392.70	(shown in the exhibit as DM 1,239.27)
1944 -	8,516.70	(shown in the exhibit as DM 851.67)
1945 -	175.00	(shown in the exhibit as DM 17.50)

Included in that sum were royalties for the war-time use by Farben of plaintiff's patents up to the time that "the Military Government took control of Farben in 1945" (hearing examiner's findings of fact 17 and 18, J.A. 292). In view of the Custodian's holding that the "judgment day" rule applied in converting appellant's reichsmark debt into dollars, the amount of the principal indebtedness which accrued during the war became important only in calculating the allowable interest under the rule of Brown v. Hiatts, 15 Wall. 17 (1873) (J.A. 309), and it was taken into account for that purpose.

The question which has now become prominent is whether this Court intended to hold that that part of the principal reichsmark debt which matured and became payable in 1942-1945 — after the vesting of Farben's assets — is "to be converted into dollars at a 1941 rate of exchange" (slip opinion, p. 6). The very case on which this Court relies in overturning the Custodian's determination teaches that where suit is brought for breach of contract to deliver foreign currency in the United States, the claimant's

damages are translated into dollars at the rate of exchange on the date of the breach of the obligation to deliver foreign currency in this country. Hicks v. Guinness, 269 U.S. 71, 80 (1925). To the same effect is International Silk Guild v. Rogers, 104 App. D.C. 330, 335, 262 F.2d 219, 224 (1958). We know of no case which, in applying the "breach day" rule of Hicks, has resorted to an exchange rate which existed months or years prior to the actual breach of the obligation. We submit that a determination that a debt was "due and owing" at a certain date for purposes of allowing it under Section 34 of the Act is not determinative of the breach day for purposes of applying the currency conversion rule of Hicks v. Guinness, supra.

Accordingly, we request that the Court clarify its mandate to show that the 1941 reichsmark/dollar exchange rate is not applicable to that part of the principal debt which matured and became payable for the first time in the years 1942-1945.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

MORTON HOLLANDER,
BRUNO A. RISTAU,
Attorneys,
Department of Justice,
Washington, D. C., 20530
Attorneys for the Appellee

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

BRUNO A. RISTAU
Attorney for Appellee.

CERTIFICATE OF SERVICE

I hereby certify, that on February 14, 1968, I served the foregoing Petition for Rehearing upon counsel for the appellant by delivering copies personally to

Joseph H. Sharlitt, Esquire
Fisher, Sharlitt & Gelband
1522 "K" Street, N. W.
Washington, D. C. 20005

BRUNO A. RISTAU
Attorney for Appellee.

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

In the opinion of the appellee the question presented is whether the district court correctly sustained the Alien Property Custodian's factual findings that (1) appellant's debt claim, asserted under Section 34 of the Trading with the Enemy Act against vested enemy assets, arose out of an obligation payable by the pre-vesting owner in Germany in German Reichsmarks; and that (2) the claim was therefore subject to conversion at the rate of ten Reichsmarks to one Deutsche Mark.

I N D E X

CITATIONS

* Cases chiefly relied upon are marked by asterisks.

Miscellaneous - Continued

UNITED STATES COURT OF APPEALS
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF THE CASE

This action (J.A. 48-58) was brought under Section 34 of the Trading with the Enemy Act, as amended, 50 U.S.C. App. 34 (hereafter "the Act"), to review the partial disallowance by the Alien Property Custodian[1/] of a debt claim, which

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1/ By Executive Order No. 9788, October 14, 1946, 11 Fed. Reg. 11981, the Office of Alien Property Custodian was terminated and its powers and functions transferred to the Attorney General. The term "Alien Property Custodian" or "Custodian", as used in this brief, includes the Attorney General or his designees, the Director or the Deputy Director of the Office of Alien Property, where the context so requires.

appellant asserted against the vested property of a German enterprise, I. G. Farbenindustrie Aktiengesellschaft (hereafter "Farben") (J.A. 285).

The material facts can be summarized as follows: The appellant is a former employe of Farben in Germany, who was dismissed in 1939 from his position as a research chemist solely for the reason that he was a person of the Jewish faith (F.F. 5[2/], J.A. 290). During World War II, the Alien Property Custodian, acting under the authority of the Trading with the Enemy Act, vested in the United States certain assets belonging to Farben (J.A. 285).

The appellant thereafter filed a timely debt claim with the Custodian against the vested assets of Farben, as provided for by Section 34 of the Act (J.A. 8-11). In effect, he claimed that Farben was indebted to him for damages for breach of his employment contract, for unpaid salary and royalties, and for a refund of his contributions to a Farben pension fund (F.F. 19, J.A. 292). Following a hearing before a departmental hearing examiner and the issuance of a recommended decision by him (J.A. 285-295), the Deputy Director issued a decision on January 26, 1965 (J.A. 303-313), allowing

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2/ "F.F." refers to the findings of fact contained in the recommended decision of a hearing examiner of the Office of Alien Property, which were adopted by the Custodian, J.A. 312.

appellant's claim in part. The decision became final on March 29, 1965, when the Attorney General declined to undertake review (J.A. 314).

Finding that appellant's claim against Farben was a proper "debt" claim (J.A. 313), the Custodian determined the principal amount of the indebtedness owed by Farben to the appellant to be Reichsmarks 160,637.92 (J.A. 306, 313). This determination is not challenged by the appellant.

The Custodian further ruled:

(1) that the debt was a Reichsmark debt payable in Germany, and subject to the post-war conversion of the German currency of one Deutsche Mark for each ten Reichsmarks (J.A. 306-307, 313);

(2) that since the claim was a debt under German law, it carried interest at the German legal rate of 4% per annum (J.A. 308, 313);

(3) that the claim in German currency was to be converted into dollars at the rate of exchange in existence on the day the administrative decision became final (J.A. 308, 313);[3/] and

(4) that no interest was allowable between June 14, 1941 and December 31, 1946 on that part of the principal

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3/ Appellant inadvertently refers to that date as January 26, 1965 (Br. fn. 58); that was the date of the Deputy Director's decision.

indebtedness which became payable on or after June 14, 1941, since during that time period Executive Order No. 8785 prohibited commercial transactions between Germany and the United States (J.A. 309-311, 313).

The appellant challenged these rulings in the district court under Section 34(e) of the Act (J.A. 48-58); he also sought leave in the court below to adduce new or additional evidence on German law. By an order entered on March 17, 1967 (J.A. 316-317), the court denied appellant's motion for leave to adduce additional testimony;[4/] granted the appellee's motion for summary judgment; and affirmed the Alien Property Custodian's administrative determination. The present appeal followed.

4/ The additional evidence which appellant sought to adduce for the first time in the district court was an affidavit executed by one Werner Galleski, which principally dealt with questions of German law. Though appellant asserts in his present brief that he does not know why the court below excluded the affidavit (Br. Point 1(D)), the record shows that the Government opposed the affidavit because appellant had made no showing, as required by Section 34(e) of the Act, that "such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him."

The appellant has now included the Galleski affidavit in the Joint Appendix (113-132), and predicates certain arguments in his brief on the assertions made by Mr. Galleski. We question the propriety of this procedure and to the extent that factual matters are argued in the Galleski affidavit, we urge that they be disregarded (see J.A. 116-117).

In any event, though appellant noted the district court's exclusion of the Galleski affidavit as one of the points in the present appeal, no argument has been offered in the brief on that issue, and the point must be deemed abandoned. See Rule 17(g) of the Rules of this Court.

STATUTE INVOLVED

The pertinent provisions of Section 34 of the Trading with the Enemy Act, 60 Stat. 925, 50 U.S.C. App. 34, read as follows:

> Sec. 34. (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, * * *. Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, * * *.
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> * * * * *
>
> (c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.
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> * * * * *
>
> (e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in

whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

SUMMARY OF ARGUMENT

1.

Appellant asserted a debt claim under Section 34 of the Trading with the Enemy Act against vested enemy assets in the possession of the Alien Property Custodian. The claim arose out of the breach of an employment contract between the appellant and the pre-vesting owner of the assets, I. G. Farbenindustrie Aktiengesellschaft of Germany ("Farben"). No place of performance was expressly designated in the employment contract. German law provides that if the place of performance is neither expressly stated nor to be inferred

from the circumstances of the contract, performance shall be at the debtor's residence at the time the obligation arose.

The Custodian ruled that the terms of the contract, the place of its execution, and the nationality and circumstances of its parties clearly showed that it was to be performed in Germany. As a consequence, he ruled that the obligation owed to the appellant by Farben was a debt in German currency (Reichsmarks), payable in Germany. In these circumstances, the courts apply the rate of exchange in effect on the date the debt is merged into a judgment in converting the foreign currency claim into dollars. Here, the statute charged the Alien Property Custodian with the responsibility of making the determination on appellant's claim and, therefore, the "judgment day" is March 29, 1965, when the Custodian's allowance became final.

Appellant has the burden of showing that the Custodian's rulings are "clearly erroneous." He has failed to carry that burden.

II.

Before the Reichsmark debt could be converted into dollars, the Custodian had to consider the application of the German Currency Conversion Law of 1948, which required all Reichsmark "debts and claims" to be converted into Deutsche Marks at the rate of 10:1. The Custodian ruled that as a claim for breach of contract, appellant's Reichsmark claim was a "debt" which

had to be converted into Deutsche Marks prior to giving judgment in dollars.

Appellant has, again, failed to show that this ruling is "clearly erroneous." Appellant's principal contention is that a large part of his claim consists of royalty payments which are in the nature of partnership distributions, and, as such, they are exempt from currency conversion. "Debts" which the Custodian may pay under the Trading with the Enemy Act out of vested enemy assets do not include partnership interests. If the royalty payments due to the appellant from Farben were genuine distributions of partnership interest, that part of the claim would not be allowable under the Act.

ARGUMENT

1. THE CUSTODIAN, HAVING FOUND THAT APPELLANT'S EMPLOYMENT CONTRACT WITH FARBEN REQUIRED PAYMENT OF COMPENSATION, AND OF DAMAGES FOR BREACH OF THE CONTRACT, IN GERMANY AND IN GERMAN CURRENCY, CORRECTLY APPLIED THE RATE OF EXCHANGE AS OF THE DATE OF THE JUDGMENT.

A. The conversion rate of a foreign currency obligation into dollars is tied to the place of performance of the obligation.

It is a settled rule that American courts cannot render judgments expressed in any currency other than dollars. International Silk Guild v. Rogers, 104 App. D.C. 330, 335, 262 F.2d 219, 224 (1958), and authorities there cited. Similarly, the Custodian can allow claims only in dollars. Therefore, all foreign currency debts enforced in the United States

must be converted into dollars. The rate of exchange at which such debts are converted from a foreign currency into dollars depends upon the place of performance (payment) of the underlying obligation.

The controlling authorities as to the date of converting foreign currency claims into dollars, are Hicks v. Guinness, 269 U.S. 71 (1925) and Deutsche Bank v. Humphrey, 272 U.S. 517 (1926) — cases involving debt claims against property vested by the Alien Property Custodian in World War I. In the former case, the Supreme Court held that where suit is brought for breach of contract to deliver foreign currency in the United States, the claimant's damages are translated into dollars at the rate of exchange on the date of breach. This is the so-called "breach day" rule. In the Deutsche Bank case, on the other hand, the Supreme Court held that where suit is brought for breach of contract to pay foreign currency in the foreign country, the claimant's damages are measured in the foreign currency at the date of breach, and converted into dollars at the rate of exchange on the date judgment is entered.[5/] This is the so-called "judgment day" rule. This Court, and all other federal courts have uniformly adhered to the "judgment

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5/ The "judgment day" here is March 29, 1965, the date the Deputy Director's decision became final. See footnote 3, supra.

day" rule of the Deutsche Bank case in converting foreign currency claims, created by foreign law and payable in foreign countries, into dollars. Reissner v. Rogers, 107 App. D.C. 260, 265, 276 F.2d 506, 511 (1960), cert. den., 364 U.S. 816 (1961), and authorities there cited.

B. It was not clearly erroneous for the Custodian to find that the debt owed by Farben to the appellant was a Reichsmark obligation payable in Germany.

The pivotal issue in this appeal is whether Farben's obligation to the appellant was a Reichsmark debt payable in the United States (as appellant contends, Br. Point I),[6/] or whether Farben's obligation was to pay Reichsmarks in Germany (as the Custodian found, J.A. 307-308). That issue, in turn, depends upon an interpretation of the employment contract between appellant and Farben, the breach of which gives rise to appellant's present debt claim.

It is clear, and not disputed by the appellant, that the place of performance of plaintiff's employment contract with Farben must be determined by an interpretation of the contract in the light of the applicable law of Germany — the place

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6/ We are unable to refer to page numbers of appellant's brief, since appellant obtained permission to file his printed brief only after submission of our brief. We shall, where feasible, refer to the "points" of appellant's argument, or to the text accompanying the consecutively numbered footnotes.

where the contract was made. Restatement, Conflict of Laws §332(g) (1934); Goodrich, Conflict of Laws §112, pp. 342-343 (3d ed. 1949).

The controlling section of the German Civil Code is Section 269 which provides (government expert's testimony before examiner, J.A. 77-78):

> If a place for performance is neither fixed nor to be inferred from the circumstances, for example, from the nature of the obligation, performance shall be effected in the place where the debtor had his residence at the time the obligation arose.

Since no place of performance was expressly specified in the contract, the government's expert on German law, Dr. Schoch, testified that Farben's obligation to plaintiff under the employment contract was payable at the place of Farben's business in Germany (J.A. 79). Dr. Schoch further gave the opinion that under German law the legal place of performance or payment was not changed as a result of plaintiff's being forced to flee from Germany on February 28, 1939 (J.A. 79). She reiterated her opinion in her supplemental affidavit (J.A. 71):

> As I have testified at the hearing, the German Civil Code lays down the basic rule that where a place of performance is neither stipulated nor to be inferred from the circumstances, for example from the nature of the obligation, performance shall be made in the place where the debtor had his residence at the time when the obligation arose; where the obligation arose in the course of the debtor's business operations, the location of the debtor's business establishment is substituted for his residence (sec. 269

> Civil Code). In the case of money debts, the debtor must remit the money at his own risk and expense to the creditor at the latter's place of residence (sec. 270). This obligation, however, does not affect the place of performance of the debt as established in sec. 269 (sec. 270, par. 4). I concluded in my testimony that Farben's obligation was to be performed at its place of business in Germany, and that the situation was not changed by the fact that Dr. Bamberger changed his residence.

The departmental examiner submitted in his recommended decision (J.A. 294) that he could "find no evidence in the record that at the time of the execution of the employment contract either party intended, or even considered the possibility, that any payments would be made outside Germany, or in the currency of another country." And upon review of all of the evidence in the record, the Custodian found (J.A. 307-308) that —

> Despite the imaginative arguments of claimant's counsel, it is quite clear from the terms of the employment contract, the place of its execution, and the nationality and circumstances of its parties that it was to be performed in Germany and must be governed by German law. The contract was executed in 1931 and was considered as extended each year until terminated by a three months' notice. The only change made during the life of the contract was an increase in claimant's compensation beginning January 1, 1937. The compensation due claimant was expressed in Reichsmarks and no mention was made of any duties to be performed by the parties, or of payments to be made, outside Germany. While the agreement not to work for a competing company was impliedly to be effective wherever claimant happened to live, it fell far short of requiring performance and payment of compensation in the United States.

These findings must therefore be accepted by the reviewing court unless the claimant sustains the formidable burden of establishing that the findings are "clearly erroneous."[7/] And, as we show below, appellant cannot sustain that burden here because the findings are amply supported by the record.

Appellant argues (Br. Point 1(D)) that the Custodian erred in failing to appreciate the distinctions "between the contract's pre-termination and post-termination obligations." First, he submits that following the termination of the employment contract in 1939, Farben insisted that appellant abide by the two-year restriction on competitive employment (for which the appellant was to receive compensation in the form of "Karenz" payments) (Br. Point 1(C)); since appellant had at that time already fled from Germany and was living in Belgium, it is said that Farben's demand indicates that Farben itself recognized that the place of performance had shifted from Germany to wherever the appellant might reside abroad (Br. Point 1(H)). Accepting appellant's reasoning arguendo, the record shows that the place of performance of that part of the contract could not have shifted to the United States. At best,

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7/ This Court has repeatedly held that in review proceedings under Section 34 of the Trading with the Enemy Act, the Custodian's determination must be sustained unless it is shown that in some material respect his findings of fact or conclusions of law are clearly erroneous. International Silk Guild v. Rogers, 104 App. D.C. 330, 335, 262 F.2d 219, 224; Reissner v. Rogers, 107 App. D.C. 260, 263, 276 F.2d 506, 509.

the facts found below would show that the place of performance shifted from February 1939 (when the employment contract was terminated) until May 1940 to Belgium, and thereafter until February 1941 to France (F.F. 1, J.A. 286). But in February 1941, the two-year restriction on competitive employment expired. (We note, in this connection, the examiner's finding (F.F. 14, J.A. 291) that appellant informed Farben in June 1939 that he no longer considered himself bound by the restraint of competition agreement.) Thus, the two-year post-employment restriction on competitive employment (February 1939 - February 1941) cannot possibly serve to establish any nexus with the United States — where the appellant first arrived in September 1941 (F.F. 1, J.A. 287).[8/]

Second, appellant points to the fact that under the original employment contract Farben was obligated, after termination

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8/ Appellant suggests (fn. 54) that the Custodian "demonstrates remarkable inconsistency" in the interpretations of contract clauses dealing with compensation for restraints on competitive employment, and he cites the decision In the Matter of Ernest Frederick Siegel (Debt Claim No. 36151). The appellant argued before the departmental examiner that, under identical circumstances as here, "Karenz" payments were construed in Siegel to have been payable in the United States. The examiner pointed out (J.A. 294), however, that in Siegel "the contract expressly provided that the debt would be payable in German marks in the country where claimant resided when each installment became due," and that the Custodian had found that the debt there involved was payable in Reichsmarks in the United States.

of the employment relationship, to continue paying royalties to the appellant for patents which the appellant obtained while working for Farben, and which Farben exploited. Since Farben knew that appellant desired to leave Germany (the employment contract was formally terminated on February 25, 1939, J.A. 291; appellant fled to Belgium on February 28, 1939, J.A. 290), the place of performance of that part of Farben's post-termination obligation is said to have shifted to wherever appellant might reside in the future. Since appellant arrived in the United States in the latter part of 1941, he urges that the Court find that the place of performance of Farben's post-termination obligation to pay royalties shifted nunc pro tunc to the United States (Br. Point 1(G)). — This argument, we submit, confuses the place where Farben had to perform its contractual obligation to pay royalties with the place where Farben may have been required to remit such royalty payments. As was demonstrated by the government's expert on German law (J.A. 71, quoted supra, pp. 11-12), the obligation which German law imposed upon Farben to remit the payments at its own risk and expense to the appellant's residence abroad did "not affect the place of performance of the debt" as established by the pertinent provisions of the German Civil Code ("Buergerliches Gesetzbuch," hereafter "BGB"). Hence, the place of performance of Farben's obligation (payment of royalties) remained in Germany.

An additional argument pressed before the Custodian, and reiterated here (Br. Point 1(F) and (G)), would have this Court hold that the "clausula rebus sic stantibus," as incorporated into Section 242, BGB, compels the conclusion that Farben's post-termination obligations under the employment contract had to be performed at appellant's new residence. (Though appellant focuses only on his residence in the United States after September 1941, in order to be consistent he would have to maintain that Farben's place of performance in 1939-1940 was in Belgium; in 1940-1941 in France; and during part of 1941 in Morocco — the place where he lived prior to coming to the United States.)

On this issue, the Custodian had before him the expert testimony of Dr. Schoch who submitted that (J.A. 72) —

> "[Clausula rebus sic stantibus] has been interpreted to mean that performance cannot be demanded of the debtor if conditions have changed to such an extent that the demand would contravene good faith, and also that the creditor can demand a performance which corresponds to the changed circumstances if good faith and ordinary usage so require. The only question is, to determine in what cases this broad rule shall apply. The Claimant's Brief does not refer to a single case in which a German court held that a change in the creditor's residence changed the place of performance from the debtor's residence or place of business under sec. 269 to that of the creditor's subsequent residence. To the best of my knowledge, based on my research of German law, there are no such cases."

In sum, appellant has made no showing that Farben was, either contractually or as a matter of German law, obligated

to deliver Reichsmarks to the appellant in the United States before or after the termination of the employment contract in February 1939. The Custodian's finding that Farben was obligated to pay Reichsmarks in Germany, and that it defaulted in this obligation, stands unimpeached.

As a consequence of the finding that Farben was obligated to pay the appellant Reichsmarks in Germany, the Custodian correctly applied the "judgment day" rule of Deutsche Bank v. Humphrey, supra (J.A. 308), and measured plaintiff's debt claim against Farben in Reichsmarks as of the date of vesting of Farben's assets (J.A. 313).

II. THE CUSTODIAN CORRECTLY CONVERTED FARBEN'S REICHSMARK DEBT INTO DEUTSCHE MARKS AT THE RATE OF 10 TO 1 PURSUANT TO THE 1948 CURRENCY CONVERSION LAW.

A. This Court's decision in Reissner v. Rogers squarely holds that Reichsmark obligations payable in Germany are convertible into Deutsche Marks at 10:1.

Before the Reichsmark debt could be translated into dollars under the "judgment day" rule, the Custodian had to deal with the implications of the Currency Conversion Law, promulgated by the Military Government in Germany in 1948 (officially known as "Law No. 63 — Third Law for Monetary Reform (Conversion Law)"; 13 Fed. Reg. 4971; J.A. A-2—A-9), under which the former "Reichsmarks" ceased to be legal tender in Germany, and a new currency — termed "Deutsche Marks" — came into existence. The government's German law expert testified before the departmental examiner (J.A. 80-81) that the German Currency Conversion Law applied to the debt owed by Farben to the plaintiff, and that the debt had to be converted at the rate of 10 Reichsmarks for 1 Deutsche Mark, and the Custodian so found (J.A. 306-307). The effect of the conversion of German currency on the instant claim was clearly a matter of German law and, as such, was properly determined as a question of fact. Black Diamond v. Stewart & Sons, 336 U.S. 386, 396-397 (1949); Cuba R.R. Co. v. Crosby, 222 U.S. 473, 479 (1912).

Even if not viewed as a pure question of fact,[9] the Custodian's conclusions are fully supported as a matter of law by the controlling and dispositive decision of this Court in Reissner v. Rogers, supra, 107 App. D.C. 260, 265, 276 F.2d 506, 511 (1960), cert. den. 364 U.S. 817 (1961). That case, which is directly in point, also involved a complaint for review under Section 34(e) of the Act of a partial disallowance of a Reichsmark debt payable in Germany asserted against the vested assets of a German business enterprise. In reversing that part of the district court's judgment which had overruled the Custodian's application of the 1948 Currency Conversion Law, this Court stated (107 App. D.C. at 266, 276 F.2d at 512):

> The holding in Deutsche Bank, supra, would seem to imply that a debt claim such as Reissner's is subject to modification by change in the currency system of the foreign currency prior to judgment. Here, prior to judgment, the German currency system was, in fact, altered so that Reichsmarks — the currency in which Reissner's compensable injury was originally computed — were replaced by Deutsche Marks as legal tender. Under the law establishing the new currency, Reichsmarks "debts and claims arising out of debts" were to be converted into Deutsche Marks at the rate of 10 Reichsmarks to one Deutsche Mark. If, under German law, Reissner's claim against Schering was a debt or a claim arising out of a debt, then clearly its amount in Reichsmarks was convertible into Deutsche Marks at the prescribed ratio.

9/ Cf., new Rule 44.1, Fed. R. Civ. Proc., which became effective July 1, 1966, after the instant action was instituted.

The pertinent passage from Mr. Justice Holmes' language in the Deutsche Bank case, to which this Court adverted, bears repeating (272 U.S. 517, 519):

> We may assume that when the Bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law — but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See Société des Hotels le Touquet Paris-Plage v. Cummings, (1922) 1 K. B. 451. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Legal Tender Cases, 12 Wall. 457, 548, 549. Obviously, in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same.

Thus, whether the question of German law be viewed as a question of fact or a question of law, it is clear that the Custodian's decision was properly sustained by the district court.

B. Appellant's authorities do not bear out his contention that damage claims are not convertible at the rate 10:1.

Arguing that under German law the appellant's debt claim is not subject to conversion at the rate of 10 Reichsmarks to 1

Deutsche Mark, appellant relies on a German Federal Supreme Court case (Br. Point 11, fn. 67)[10/] and commentators on the German Civil Code (id., fn. 68).

The decision of the Federal Supreme Court of July 10, 1954, 14 BGHZ 212, fully supports the Custodian. It involved a suit by a resident of the Soviet Zone of Germany against a debtor in West Germany for future payments of a monthly annuity which he was entitled to receive as compensation for bodily injuries suffered in 1937. The annuity due was originally expressed in Reichsmarks, and amounted to RM 24.25 per month. At the time suit was brought, the debtor was in default of payments, amounting to RM 4,024.80, from 1945 until the enactment of the 1948 Currency Conversion Law. There was no dispute that the payments accrued until 1948 had to be converted at 10:1, and plaintiff demanded payment of 402.48 Deutsche Marks. The issue between the parties was in what amount future payments were to be made and to be converted from "Deutsche Marks" to "Deutsche Marks Ost" (the currency which the Soviet authorities issued in their occupation zone to replace the former Reichsmark). The Federal Supreme Court — reversing the court of appeals of Bamberg which had given judgment for the plaintiff on a complicated formula based upon the purchasing power of "Deutsche Marks

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10/ This case is also heavily relied on in the proffered Galleski affidavit (see J.A. 115, 123).

Ost" as against the Deutsche Mark — held that plaintiff was entitled to future payments of DM 24.25 per month.

Nor can appellant find any comfort in the Commentary on the German Civil Code Issued by the Judges of the Reichsgericht and Bundesgericht (11th ed. 1960, Vol. 1, part 2) Annotation No. 9 to Section 286, BGB. It should be pointed out that the German doctrine of breach of contract is strikingly different from the common law on this topic.[11/] The German doctrine of breach of contract distinguishes three types of breaches (Vertragsverletzungen):

(a) delayed performance (Verzug);

(b) subsequent impossibility of performance for which a party is responsible (Unmöglichkeit);

(c) positive violations of contractual duty (positive Vertragsverletzungen).

Following the example of Roman law, and unlike Anglo-American law, German law grants the general remedies for breach of contract only if the debtor has acted either wilfully or negligently (Section 276, BGB). German law deviates also considerably from the common law in its treatment of "delayed performance" (Verzug). It is a principle of German law that

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11/ See 1 Manual of German Law 74-80 (Brit. Foreign Office, 1950). The summary which follows is taken from this work, which is probably the only comprehensive reference work on the German Civil Code published in the English language.

the fact that the debtor performs later than at the time when performance was due does not suffice to render his performance a delayed performance. To bring the debtor into "Verzug" it is necessary, in addition to the performance being due and not yet being made, that the following requirements should be complied with:

(a) The creditor must have sent to the debtor a warning (Mahnung). The warning must consist in an unconditional request for performance. (It is dispensed with if the debtor has already refused to make performance.)

(b) The delayed performance must result from the debtor's wilful or negligent act.

Additionally, it is significant that the general remedy for breach of contract under German law is specific performance. Money damages are the exception rather than the rule.

Against this background, we now turn to the question as to the remedy available to appellant under German law.

The government's expert testified in the course of the administrative hearing (J.A. 63), that appellant's claim for damages is predicated on Section 286, BGB,[12/] and that under

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12/ Section 286 reads as follows:

"Der Schuldner hat dem Gläubiger den durch den Verzug entstehenden Schaden zu ersetzen.
"Hat die Leistung infolge des Verzugs für den Gläubiger kein Interesse, so kann dieser unter Ablehnung der Leistung Schadensersatz wegen Nichterfüllung verlangen. Die für das Vertragsmässige

(Cont'd next page)

Section 288, BGB,[13] these damages consist of 4% interest per annum, and generally such further damages flowing from the delay, which the creditor is able to prove. Appellant, however, urges (Br. Point 11(B)) — as he did before the departmental examiner in his supplemental Brief (J.A. 62) — that he is not seeking to enforce the obligation Farben owed him under his employment contract, but that he is asking for damages ". . . necessary to make him [the appellant] whole in light of the lesser value of the devalued German currency, the Deutschemark."

12/ Continued from page 23.

Rücktrittsrecht geltenden Vorschriften der §§ 346 bis 356 finden entsprechende Anwendung."

[The debtor must compensate the creditor for damages occasioned by delay.

[If, in consequence of the delay, the performance is of no interest to the creditor, the latter may decline performance and demand damages for non-performance. The provisions of §§ 346-356 concerning the contractual right of rescission are correspondingly applicable.]

13/ Section 288 reads as follows:

"Eine Geldschuld ist während des Verzugs mit vier von Hundert für das Jahr zu verzinsen. Kann der Gläubiger aus einem anderen Rechtsgrunde höhere Zinsen verlangen, so sind diese fortzuentrichten.

"Die Geltendmachung eines weiteren Schadens ist nicht ausgeschlossen."

[A money debt bears interest at the rate of 4 per cent per annum from the time of delay. If the creditor is entitled to claim higher interest on another legal ground, such higher interest shall be paid.

[The claim of further damages is not precluded.]

There is no such remedy under German law. The Government's expert so testified (J.A. 62-63), and the authoritative commentaries of the BGB make it clear. Thus, the Commentary on the German Civil Code Issued by the Judges of the Reichsgericht and Bundesgericht (11th ed. 1960, Vol. 1, part 2), Annotation No. 2 to Section 286, BGB, explains the choice of damages which a creditor has, and the interrelation between damages for delay and damages for non-performance:

> "As regards §286, the claim for damages is in addition to the claim for specific performance (which continues in existence), since §286 provides for damages occasioned by delay, and not for damages occasioned by non-performance, as provided for in §280 or §316. The situation is different, however, if the condition of paragraph 2 of §286 is met, i.e., if the creditor — because of the debtor's delay — is no longer interested in the debtor's performance (cf. annot. 13). Thus, a claim for damages due to delay is to be strictly differentiated from a claim for damages for non-performance. The latter is not in addition to, but in lieu of the claim for specific performance. Therefore, damage claims for non-performance and for delayed performance cannot, as a matter of principle, be asserted simultaneously [citing cases]. That which applies to damage claims due to non-performance applies equally to damage claims arising out of positive violations of a contractual duty. [Italics in original.] 14/

14/ The German text reads as follows:

> "Im Falle des § 286 tritt der Schadensersatzanspruch neben den fortbestehenden Leistungsanspruch, da hier der durch den Verzug entstandene Schaden, nicht aber, wie bei § 280 oder § 326, der durch die Nichterfüllung verursachte Schaden zu

(Cont'd on next page)

Here, the appellant necessarily elected to claim damages for non-performance when he filed his debt claim with the Custodian. Since no payment whatsoever had been made of the debt which Farben owed to the appellant, no claim for delayed performance (late payment) could be logically asserted.[15] The measure of damages for non-performance consist of payment of the principal Reichsmark debt plus statutory interest, and those damages are convertible at the rate of 10 R ichsmarks to 1 Deutsche Mark.

14/ Continued from page 25.

ersetzen ist. Anders jedoch, sofern die Voraussetzung des § 286 Abs. 2 vorliegt, dass infolge des Verzugs die Leistung für den Gläubiger kein Interesse mehr hat (vgl. Anm. 13). Der Schadensersatzanspruch wegen Verzuges ist sonach streng von dem Schadensersatzanspruch wegen Nichterfüllung zu unterscheiden. Dieser tritt nicht neben, sondern an die Stelle des Leistungsanspruchs. Schadensersatz wegen Nichterfüllung und wegen verspäteter Erfüllung können daher grundsätzlich nich nebeneinander begehrt werden (RG 94,203,206; BGH NJW 1953, 337 Nr. 1). Was für den Schaden wegen Nichterfüllung gilt, ist gleicherweise auf den Schaden aus positiver Vertragsverletzung anzuwenden (BGH aa0)."

15/ The translation of Annotation No. 9 to Section 286, BGB, of the Commentary on the German Civil Code Issued by the Judges of the Reichsgericht and Bundesgericht set forth in appellant's brief in the next accompanying fn. 68 is inaccurate and confusing. The German term "Verzugsschaden" is there translated as "default damages." A more accurate translation would be "damages for delayed [or late] performance." Hence, the passage should read: "Damages for delayed performance encompass disadvantages resulting from money devaluation . . . ." So translated, it becomes obvious that the damages which are the subject of that particular annotation are not involved here.

Appellant refers also (Br. Point 11(B)) to Palandt's authoritative Commentary on the German Civil Code (21st ed. 1962), Annotation 2(b) to Section 286, p. 257, and suggests that it is "in full accord" with his thesis, that damages for non-payment of Reichsmark debts were not subject to conversion. Palandt's annotation states exactly the opposite, viz.:

> To the extent that the claim was for money, it was subject to conversion if it arose prior to the currency reform, since the debtor could have paid it in Reichsmarks. A genuine "value liability" was not created. 16/

C. There is no merit in appellant's alternate contention that that part of appellant's debt claim comprising royalty payments is exempt from the Currency Conversion Law.

Appellant argues in the alternative (Br. Point 111(A)) that even if the Custodian was correct in converting some of the items in appellant's debt claim from Reichsmarks into Deutsche Marks at the rate of 10:1, he erred in similarly converting that part of his claim which is for unpaid royalties. He submits that under German law royalty payments are in the nature of "settlements between partners," and that pursuant to

16/ The German text reads as follows:

> "Soweit der Anspruch auf Geld ging, unterlag er, wenn vor der Währungsreform entstanden, der Umstellung, da der Schuldner ihn in RM hätte abdecken können. Ein echter Wertanspruch liegt nicht vor. . . ."

Section 18(3) of the Currency Conversion Law partnership distributions are exempt from the 10:1 conversion ratio (J.A. A-4). The argument is without substance.

There can be no doubt that what is a "debt" for purposes of Section 34 of the Trading with the Enemy Act is a question of construction of a statute of the United States, and that for that purpose the conclusory characterization used by German law is not controlling.

Section 34 of the Act took over the word "debt" from Section 9(a), and it was not intended to depart from the Section 9(a) meaning of "what constitutes a debt." H. Rep. No. 2398, 79th Cong., 2d Sess., p. 10. As far as we have been able to determine, all the reported decisions under Section 9(a) on "debts" approved claims which arose out of contract, Miller v. Robertson, 266 U.S. 243 (1924); Sutherland v. Kanawha Valley Bank, 48 F.2d 1027 (C.A. 4 1931), or which were at any rate quasi-contract claims in the sense of claims for unjust enrichment. See, e.g., Rockwood v. Miller, 53 App. D.C. 366, 290 Fed. 341 (1923). No reported case under Section 9(a) allowed a partnership distribution as a "debt." In one case it was agreed that a tort claim was not a "debt," W. S. Tyler v. Deutsche D. G. Hansa, 276 Fed. 134, 136 (N.D. Ohio 1921), and in another a claim was specifically denied because

it arose out of a tort, Stasi v. Markham, 69 F. Supp. 163 (D.N.J. 1946).

Similarly, under Section 34 the only claims that have been recognized by the courts have arisen out of express contracts, Brownell v. Bank of America, etc., 94 U.S. App. D.C. 206, 214 F.2d 855 (1954), or quasi-contract in the sense of unjust enrichment, International Silk Guild v. Rogers, supra, 104 App. D.C. 330, 335, 262 F.2d 219, 224; Reissner v. Rogers, supra, 107 App. D.C. 260, 265, 276 F.2d 506, 511.

Hence, if appellant's Reichsmark claim is a proper debt claim as that term is understood in American law, it is subject to the conversion at the rate of 10:1; if it is not a debt claim but a partnership distribution, it would not be cognizable under Section 34 of the Trading with the Enemy Act at all.[17/]

Appellant's final contention (Br. Point IV) that the 1948 Currency Conversion Law was never intended to apply to debts asserted under Section 34 of the Trading with the Enemy Act is equally devoid of merit. It is premised on an erroneous view of the nature of a Section 34 debt claim.

17/ Section 16 of the Currency Conversion Law provided that "In principle, Reichsmark claims shall be so converted into Deutsche Mark claims that the debtor shall be obliged to pay to the creditor one Deutsche Mark for every ten Reichsmarks due." Section 13 defined Reichsmark "debts and claims" as "all debts and claims arising out of debts incurred before June 21, 1948, which are expressed in Reichsmarks * * *." (J.A. A-4).

Congress added Section 34 to the Trading with the Enemy Act, 60 Stat. 925, in order "[t]o provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit." S. Rep. No. 1839, 79th Cong., 2d Sess., p. 2. The Office of Alien Property stands in the shoes of the pre-vesting enemy owner, and the Custodian adjudicates the debt claim under substantive principles of law in existence in the country where the debt arose. Section 34 debt claims are not claims against the United States in the conventional sense, but the government is placed in a position akin to that of a stakeholder. This Court's holding in Reissner v. Rogers, quoted at p. 19, above, is fully dispositive of this issue in this Circuit.

There is thus no basis for the suggestion that the instant claim arose "outside" of Germany because it is asserted against enemy property vested in the United States; nor is there any basis for the claim that application of the Currency Conversion Law constitutes, in effect, a confiscation. The Supreme Court's holding in the Deutsche Bank case, 272 U.S. at 519 (quoted above, p. 20), is directly apposite: appellant's debt claim was fixed in Reichsmarks; it was not tied to any extrinsic value, or to the currency of another country; it was subject to increase or decrease of the purchasing power of the

Reichsmark, or to conversion into another "Mark"; the fact that the Military Government in Germany decided to do away with the inflated Reichsmark currency and to substitute a new currency did not constitute a "confiscation." 18/

CONCLUSION

For the foregoing reasons, we submit that the district court did not err in granting appellee's motion for summary judgment, and properly affirmed the Custodian's determination that appellant recover the countervalue in dollars of Deutsche Marks 16,063.79, plus interest at the rate of 4% per annum from the dates set forth in the Custodian's decision until

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18/ Nor does the Supreme Court's decision in Honda v. Clark, 386 U.S. 484 (1967) require a disregard of the German Currency Conversion Law (Br. Point V). In Honda the Court held that where the Custodian entered into a compromise with one group of debt claimants, agreeing to pay their Japanese Yen claims at an exchange rate which was more favorable than the official post-war Dollar/Yen rate, equitable doctrine of tolling preserved the claims of simularly situated debt claimants against the defense of limitations. The Supreme Court in no way intimated what its view would have been on the official rate, had that issue been presented.

March 29, 1965, at the dollar exchange rate in existence on March 29, 1965.[19/]

The district court's judgment should be affirmed.

Respectfully submitted,

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October, 1967.

19/ The Custodian's interest calculation until December 31, 1964 amounted to DM 14,906.81 (J.A. 311). There is due to the appellant additional interest from January 1, 1965 to March 29, 1965 (the day the administrative decision became final), amounting to DM 15.71. Hence, appellant is due the total of DM 30,986.31, converted into dollars at the official rate existing on March 29, 1965 of 1 DM = $.2525, or $7,824.04.

REPLY BRIEF OF APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,991

CURT BAMBERGER,

Appellant,

v.

RAMSEY CLARK, Attorney General of the United States,

Appellee.

On Appeal from a Decision of the United States District Court for the District of Columbia

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CURT BAMBERGER,

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REPLY BRIEF OF APPELLANT

I. INTRODUCTION AND SUMMARY

For the first time in the long and tortured history of this case, the Government has now attempted to state a plausible across-the-board defense of its emasculation of Appellant's claim. The key issues of German and American law have at last been joined.

Yet instead of clarifying these issues, the Government has sought only to blur and distort, serving up to this Court, as the entire basis of its defense, three over-ripe fallacies that must fall of their own weight.

The Government, in its Brief, has now told this Court:

1. **That the Appellant has attacked "factual findings" of the Alien Property Custodian.** (Gov. Br. i)[1] This contention, reiterated throughout the Government's Brief, has a transparent purpose – to defeat review by this Court. *There is not a single issue of fact* in this case, however. This appeal is based entirely on questions of German law and the rules of American law applicable to conversion of foreign currency debts to dollars. As to these issues, no presumptive rectitude can be accorded the Government, and this Court may freely search, discover and pronounce the *pure* questions of law, American and foreign, (see Argument II, *infra*, pp. 3-6) that apply to the determination of the proper rules for converting Appellant's Reichsmark claim to dollars.

2. **That performance under Dr. Bamberger's contract with Farben was solely in Germany and, if not, wholly outside the United States; accordingly, the Government says, the "judgment-day" rule and devaluation under the 1948 German Currency Reform Law must be forced on Dr. Bamberger.** But, to determine the place of performance, the Government ignores clear contractual language and the equally clear language and meaning of the *German* law it admits is controlling, while, moreover, grossly misstating stipulated facts. Then, purporting to state *American* law with regard to the consequences of place of performance of a foreign contract for the application of a foreign devaluation statute, the Government expands the ambit of *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926) and contracts the ambit of the companion case of *Hicks v. Guinness*, 269 U.S. 71 (1925) (Gov. Br. 9-10), beyond all warrant in those and similar cases, so as to apply a deceptively simple judgment-day rule to *all* foreign contract claims arising from breach of performance due *anywhere* outside the United States forum.

Thus, the Government grossly distorts the central choice-of-law issue in this case, ignoring the place of performance of the obligations from which this claim arises and misleading the

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[1] Reference to "Gov. Br." herein, followed by page numbers, refer to the Brief for the Appellee. References to "App. Br." similarly refer to the Brief of Appellant.

Court as to the consequences that flow under American law from that place of performance. (See Arg. III, *infra*, pp. 6–14)

3. **That German law, as viewed by both American and German courts, requires devaluation of Dr. Bamberger's claim.** But examination of the American cases relied on by the Government reveals that the Government's authorities concerned claims very different from that of Dr. Bamberger – which, by sharp distinctions under German law, were subject to currency devaluation – whereas, by equally clear holdings under German law, Dr. Bamberger's claim cannot be devalued. The Government's treatment of the German authorities is less complex: It simply miscites their holdings. (See Arg. IV, *infra*, pp. 15-22)

To justify its action in denying 95% of the admitted value of Appellant's claim, the Government has performed a pure *tour de force*, a fitting conclusion to its record of contortioned delay over the long years in this case. The Government's Brief on Appeal seeks to force review by this Court into the narrow defile of its own conception of issues of law in converting Reichsmarks obligations to dollars. It nonetheless remains Appellant's view that a proper, straightforward, and honorable disposition of this case would compensate Appellant for the full undevalued amount of his claim, with appropriate interest[2] for all the years of delay that have frustrated his quest for a just result.

II. THE GOVERNMENT ERRS IN ITS EFFORTS TO CHARACTERIZE THE PROPER LAW OF CONVERSION AS "FACTUAL FINDINGS", TO IMPOSE UPON THE APPELLANT A BURDEN OF PROVING ERROR OF FOREIGN LAW ACCORDING TO A "CLEARLY ERRONEOUS" TEST, AND TO BAR THE CONSIDERATION OF APPELLANT'S VIEWS WITH REGARD TO KEY ISSUES OF GERMAN LAW.

Every issue remaining in this case is wholly a legal issue. The government and Dr. Bamberger have stipulated that 160,637.92 Reichsmarks were due Dr. Bamberger on March 15, 1942, and, as

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[2] The Government's computation of interest (Gov. Br. 32, fn. 19, referring to J.A. 311) selectively and erroneously looks to German law to accord only 4% interest per annum of the value of Appellant's claim, and then to American law (*Brown v. Hiatts*, 15 Wall. 177 (1873)) to exclude major portions of time. The correct measure – 6% without interruption – is firmly set forth in decisions of the U.S. Supreme Court, *Hicks v. Guinness*, *supra*, and *Miller v. Robertson*, 266 U.S. 243 (1924), and of this Court, *Brownell v. Bank of America* (94 App. D.C.), 214 F. 2d 885 (1954), *cert. den.* 348 U.S. 864 (1954). Note also that the OAP has paid 5% uninterrupted interest. *In the Matter of Ernest Frederick Siegel*, Debt Claim No. 36151 (J.A. 294). Cf. *Reissner v. Rogers*, 276 F. 2d 506, where this Court held interest was to be paid for the entire period of default without interruption.

a result, the only factual contest was taken out of the case. What remains are questions of whether to apply the "judgment day" or "breach day" rules to this Reichsmark sum, and if the former applies, whether rules of German law thus made applicable exempt Dr. Bamberger's claim from devaluation. All of these matters are *pure issues of law.*

The entire frame of the Government's case is thus expressed in its attempt to characterize its determination of these issues, on which its trivial award to the Appellant must rest, as "factual findings".[3] To perfect this sleight-of-hand, the Government miscites precedent and ignores Federal court standards for determining foreign law questions specifically intended to redress the potential of such procedural abuse.

This characterization is false, and artfully so. Its purpose is transparently obvious: to defeat review by this Court. If "factual findings" of the Custodian (or his successor, the Deputy Director) were at issue in this appeal, the Appellant would have to bear the ponderous "clearly erroneous" burden, applicable to the findings of a jury under the strictures of Rule 52(a), Fed. Rules Civ. Proc., 28 U.S.C. Yet no such limitations encumber this Court when scrutinizing pure issues of *law,* as Rule 52(a) itself – whose "clearly erroneous" test for review of factual findings the Government attempts to apply so promiscuously to this case – makes clear. No presumptions can rightly be accorded to conclusions of law, and the appellate court may search, discover and pronounce the law as it finds it.

Thus, the misstatements are legion in the Government's bland assertion (Gov. Br. 13, fn. 7) that:

> "This Court has repeatedly held that in review proceedings under Section 34 of the Trading With the Enemy Act, the Custodian's determination must be sustained unless it is shown that in some material respect his findings of fact *or conclusions of law are clearly erroneous. International Silk Guild v. Rogers,* 104 App. D.C. 330,

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[3] In the Government's words:

> ". . . the question presented is whether the district court correctly sustained the Alien Property Custodian's *factual findings* that (1) appellant's debt claim, asserted under Section 34 of the Trading with the Enemy Act against vested enemy assets, arose out of an obligation payable by the prevesting owner in Germany in German Reichsmarks; and that (2) the claim was therefore subject to conversion at the rate of ten Reichsmarks to one Deutsche Mark." (Emphasis Added.) (Gov. Br. i) The same is echoed at Gov. Br. 13 and 18. The "clearly erroneous" test is asserted at Gov. Br. 7, 8, 10, and 13.

335, 262 F. 2d 219, 224; *Reissner v. Rogers,* 107 App. D.C. 260, 263, 276 F. 2d 506, 509." (Emphasis Added.)

Neither case holds anything of the sort.

In *International Silk Guild,* the sole "determination" to which the Court applied the "clearly erroneous" test was the District Court's finding that an agreement had, in fact, existed between certain exporters and the Guild. In describing it, the Court of Appeals specifically stated:

> "In so ruling the Court necessarily held that the Custodian's contrary finding, *insofar as it might be considered to be factual,* was clearly erroneous." (Emphasis Added.) *International Silk Guild v. Rogers, supra,* 262 F. 2d at 224 (the page cited by the Government.)

Significantly, the subsequent holding by the District Court as to the proper conversion rate – bitterly contested in both the District Court and the Court of Appeals – was *not* included within the findings to which the "clearly erroneous" test was held applicable by this Court. Also, in *Reissner v. Rogers,* 276 F. 2d 506, this Court's application of the "clearly erroneous" test, as cited by the Government (276 F. 2d at 509), was to the District Court's determination of the *amount* of Reissner's claim in Reichsmarks, a factual finding comparable to the issue *removed* from the instant case by stipulation.[4]

Any doubt that this Court has totally unfettered power to reverse the Deputy Director's misconceptions of *foreign* law is now removed by Rule 44.1, Fed. Rules Civ. Proc., 28 U.S.C., applicable by its terms to all Federal Court proceedings after July 1, 1966. That Rule's third sentence provides:

> "This Court's determination [of an issue of foreign law] shall be treated as a ruling on a question of law."

Lest there be any doubt as to its meaning, the Advisory Committee in its annotation to the Rule stated:

> "Under the third sentence, the Court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law' not 'fact', so that appellate review will not be narrowly confined by the 'clearly erroneous' standard of Rule 52(a)."

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[4] At page *512* of the *Reissner* decision, however, this Court styled the determination by the Attorney General that Reissner's claim was a debt claim subject to conversion at the judgment day rate "as a finding of fact". That conclusion can only be considered to have been supplanted by the subsequent promulgation of Rule 44.1, Fed. Rules Civ. Proc., 28 U.S.C. See, *infra,* pp. 5-6.

Thus in determining whether the Government is correct on the whole range of German law issues in this case (the locus of performance of the Bamberger-Farben post-termination obligations, the exemption of damage claims and partnership distributions from the 1948 devaluation law, and whether the devaluation law was intended to apply to a controversy such as herein involved) this Court may take its own, independent view of German law and need grant no presumptions to the conclusions of German law propounded by the Government in earlier stages of this case. Obviously, the same is at least equally true of questions of *American* law (whether the "judgment day" or "breach day" rule applies and which interest rate is applicable) which no court could ever correctly subject to a "clearly erroneous" test. Contrary to the persistent statements and implication of the Government in its Brief, what it has done in this case can have no shelter from plenary review by this appellate Court.

This conclusion is of overwhelming importance, both to the Appellant and to the Government. It is important to the Appellant because full review of the issues of law in this case affords the Appellant the first opportunity – before any tribunal – to have his side of the legal issues examined. At every juncture, the Government has done all it could to prevent such consideration. Now by wholesale misstatements of the nature of the Deputy Director's determinations – in an attempt to insulate them from review by the deceptively false label of "findings of fact" – the Government seeks to keep all law but its own version from *this* Court.

The Government does so because it is wrong on the substance of both foreign and American law issues, and hopes to brazen these errors through review by this Court.

III. THE GOVERNMENT GROSSLY MISSTATES THE CENTRAL CHOICE OF LAW ISSUE IN THIS CASE: IT MISAPPLIES THE RULES OF GERMAN LAW DETERMINING PLACE OF PERFORMANCE, AND MISINFORMS THE COURT AS TO THE AMERICAN CASE LAW APPLYING PLACE OF PERFORMANCE TO DETERMINE WHETHER THE JUDGMENT DAY (AND DEVALUATION) OR THE BREACH DAY (AND TRUE VALUE) APPLIES TO THIS CLAIM.

Both parties agree on the outlines of the choice of law question in this case, but there the agreement ends. American law determines the date ("judgment date" or "breach date") at which a foreign obligation to pay Reichsmarks is to be converted to dollars by reference

to the place of performance of contract, determined by reference to the law (German) of the place of contracting.[5] The parties dispute the application of *German* law in determining the place of performance of the Farben-Bamberger contract, as well as the requirements of *American* law as to the consequences of an obligation to pay money clearly performable outside of Germany (including but not restricted to the United States).

A. The Government Would Have this Court Take a Third- Best Determinant of the Place of Performance of the Farben-Bamberger Contract, Ignoring Its Elementary Duty to Infer the Place of Performance from the Circumstances of the Contract Which Strongly Point to Performance Outside Germany.

If the post-termination obligations incumbent on the parties in this contract were to be performed outside of Germany, and German law would so find, then the "breach day" rule must apply.

The Government, as it has throughout this case, chooses to ignore the strong implications of post-termination obligations to be performed by the parties outside of Germany, seeking shelter in the specious (see, *supra*, pp. 3-6) contention, with regard to the Deputy Director's determination that the contract was to be performed solely in Germany, that:

> "These findings must therefore be accepted by the reviewing Court unless the claimant sustains the formidable burden of establishing that the findings are 'clearly erroneous'. And, as we show below, appellant cannot sustain that burden here because the findings are amply supported by the record." (Gov. Br. 13)

Even within that false standard the finding of performance solely in Germany is by no means "amply supported by the record." The finding of the Deputy Director that the Government would thereby foist upon this court, that:

> "no mention was made of any duties to be performed by the parties, or of payments to be made outside of Germany." (Gov. Br. 12).

is the focal misconception in this case. It ignores the plain words of agreement forbidding Dr. Bamberger from employment across the world for two years after termination (App. Br. 19-20);

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[5] If Germany is the place of performance of the contract, German law determines the extent of Farben's obligation with regard to the devaluation of German currency. See Arg. IV. *infra*, pp. 15-22.

moreover the Government selectively withholds mention of Farben's knowledge that Dr. Bamberger was to emigrate when his contract was last renewed, withholds mention of Farben's insistence on Dr. Bamberger's non-competition when he was actually living outside Germany, and most tellingly fails to mention one word of Farben's attempt to pay Dr. Bamberger *while he was outside of Germany.* There is not one word of refutation by the Government of these overwhelming indications that the post-termination obligations under this contract were to be performed outside Germany – nor has there ever been in this case.[6] No false standard erected against appellate review can keep these crucial legal considerations from this Court.

Nor can this Court ignore, as the Government selectively has done (except for recurrent lip-service), the provision of German law which controls interpretation of these contract terms and points to their locus. By the rule which both parties agree is controlling, Section 269 of the Civil Code,[7] clear priority is assigned in determining the place of performance of a contract to its literal meaning and implications arising from the circumstances and the nature of the obligation. Yet the Government has throughout this proceeding argued for what to any court, German or American, can only be a third-best determinant of Farben's place of performance, its offices in Germany. Section 269 does indeed place the locus of performance at the residence of the

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[6] The Government only digs deeper in its own inconsistencies when it seeks to refute Appellant's analogy to the only other reported action of the Office of Alien Property involving restraint of competition obligations, *In the Matter of Ernest Frederick Siegel,* Debt Claim No. 36151, cited by Appellant in his brief (App. Br. 23, fn. 54). The Government purports to distinguish the disposition there, where performance in the United States was found, from the instant case by reference to the finding by the Hearing Examiner there that

> " 'the contract *expressly* provided that the debt would be payable in German marks in the country where claimant resided when each installment became due. . .' " (Emphasis added.) (Gov. Br. 14, fn. 8)

Surely there is no meaningful distinction to be drawn between a case where a payment obligation overseas (from Germany) is due, and one, as here, where it is clearly to be "inferred from the circumstances", *infra.* Moreover, this Court should note the probity of the Government's quotation from *Siegel* which conveniently adds the word "expressly" to the quotation from the Hearing Examiner's findings cited by the Government at J.A. 294.

[7] "*If a place of performance is neither fixed nor to be inferred from the circumstances, for example from the nature of the obligation,* performance shall be effected in the place where the debtor had his residence at the time the obligation arose." (Emphasis added.) Next to the clearly erroneous test falsely inserted to divert this Court's scrutiny, the Government most heavily relies on Section 269 to sustain its position on the crucial issue of place of performance.

debtor, but if and only if, a place of performance is "*neither fixed nor to be inferred from the circumstances.*"

Appellant submits that it would be difficult to conceive of contract circumstances dictating performance outside of Germany more forcefully than those in the Farben-Bamberger agreement. All the considerations, *supra,* pointing toward Dr. Bamberger's obligations to forbear from competition and Farben's obligation to pay for that forbearance, outside of Germany, are circumstances of which Section 269 clearly speaks.

Moreover, the Government makes no effort, beyond its repeated – and erroneous – reference to the absence of cases in point, to rebut the applicability of Section 242 of the German Civil Code, which dispels all doubt as to how a German court would find the locus of performance amidst the circumstances that intervened to breach this agreement. Section 242, it will be remembered (App. Br. 22-23) applies the equitable maxim of "*clausula rebus sic stantibus*" to the interpretation of obligations, so that the:

> "creditor can demand a performance which corresponds to the changed circumstances if good faith and ordinary usage so require."[8]

The Government has by no means denied that Section 242, applied to the post-termination obligations in this case, would compel the conclusion that these obligations were to be performed outside of Germany – where the circumstances of war and persecution placed Dr. Bamberger, where Farben required Dr. Bamberger to forbear from competition (J.A. 227-229), and where Farben sought to pay him for his forbearance. The Government merely reiterates its wan reference that it has found no cases in which this form of equity was done. (Gov. Br. 16)[9]

The Government's research into German case law simply has not gone far enough. It has apparently ignored the decision of the Supreme Court of the British Zone of Occupation of March 10, 1949 (1 OGHBZ 363), which is clearly and explicitly in point. That decision, summarized in Enneccerus-Lehmann, *Lehrbuch des Bürgerlichen Rechts, Recht de Schuldverhältnisse*

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[8] The words and the conclusion are those of the Government's German law expert, Dr. Schoch. (J.A. 72)

[9] Thus the Government ignores the applicability of German statutory law, regardless of *stare decisis*, according to familiar civil law principles.

(a leading textbook of German Civil law), 15th Edition, 1958, Section 23, p. 101, is as follows:

> "If a place is agreed upon at which performance has become impossible by reason of war and post-war events then the original place of performance must be substituted by a place reasonable according to the factual situation, OGH 1, 363." [10]

A "place [of performance] reasonable according to the factual situation" can only have been outside of Germany, specifically including the United States. A further look by the Government – long overdue – would indeed have been conclusively revealing.

The significance of the Government's apparent oversight is made clear by its next argument (Gov. Br. 13-14) in seeking to deride Appellant's never-before-challenged residency in the United States during the period of the Farben-Bamberger contract, which established the direct nexus with the United States on which Appellant's claim is based. It does so by a sweeping and transparent error, which cannot go unnoticed. The Government contends as follows:

> "At best, the facts found below would show that the place of performance shifted from February 1939 (when the employment contract was terminated) until May 1940 to Belgium, and thereafter until February 1941 to France (F.F. 1, J.A. 286). But in February 1941 the two-year restriction on competitive employment expired . . . Thus, the two-year post-employment restriction on competitive employment (February 1939–February 1941) cannot possibly serve to establish any nexus with the United States – where the appellant first arrived in September 1941 (F.F. 1, J.A. 287)." (Gov. Br. 13-14)

In making this triumphant discovery, the Government's attorney may not have been aware (though reference to App. Br. 5 and references there cited would have cured any uncertainty) that Appellant's termination was not effective until *October 31, 1939,* at which date the post-employment restriction on competitive employment commenced, to run for two years until *October 31, 1941,* during which period Appellant was bound, as Farben admitted, not to compete in the United States and for which restraint:

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[10] The German text reads as follows:

> "Ist ein Ort vereinbart, an dem infolge der Ereignisse der Kriegsund Nachkriegszeit die Erfuellung unmoeglich geworden ist, so ist der urspruengliche Erfuellungsort durch einen der Sachlage angemessenen ort zu ersetzen, OGH 1, 363."

> "you [Appellant] will receive the Karenz pay as laid down in the Collective Agreement." (J.A. 226)

Appellant, having arrived in the U.S. in September 1941 (Gov. Br. 14) – specifically *September 12, 1941* (App. Br. 7) – was actually under contract to Farben for *49 days* in the United States. Notwithstanding the Government's labors, the nexus of Farben's obligation to the U.S. is thus confirmed.

When all of these diversions are thus boiled away, the Government has not touched the essential thrust of the Appellant's position: that the terms of the Farben-Bamberger agreement, the German law interpreting that agreement, and the actual conduct of the parties compel the conclusion under German law that the place of performance of the post-termination obligations was wherever Dr. Bamberger resided. If he performed these obligations outside of Germany (as, in fact, he did), the locus of performance of these obligations was outside of Germany.

B. Any Application of the Rule in *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, to Obligations Payable Outside of the Place of Contracting Is Beyond the Holding of That Case, Contrary to Precedent, and Inconsistent with the Holding in *Hicks v. Guinness*.

Against this backdrop of contention as to German law, the Government's arguments regarding the American legal consequences for conversion of German debts owed outside of Germany are equally unworthy.

The Government correctly states the holding in *Deutsche Bank* as applying the judgment day rule:

> "where suit is brought for breach of contract *to pay foreign currency in the foreign country* [i.e., the place of contracting]" (Gov. Br. 9; italics in original),

but then grossly mistakes the scope of the rule in application –

> "This Court, and all other federal courts have uniformly adhered to the 'judgment day' rule of the *Deutsche Bank* case in converting foreign currency claims, created by foreign law and *payable in foreign countries*, into dollars. (Citing *Reissner, supra*, 267 F.2d at 511, and "authorities there cited")." (Gov. Br. 9-10) (Emphasis added.)

Hence, another snare is injected to this case, as "*the foreign country*" is transmuted to "*foreign countries*". Neither the *Reissner* case nor the "authorities there cited' in any way

substantiate this easy generalization of a specific geographic situation. Counsel for Appellant believes, upon diligent search, that no Federal case warrants any such extension of *Deutsche Bank*. Yet, if the crucial post-termination obligations in this case were to be performed outside of Germany (as Appellant has shown) but, *arguendo*,[11] not specifically in the United States, Appellant's claim falls squarely within the enlarged – and misrepresented – ambit of the *Deutsche Bank* holding.

Indeed, the Restatement, *Conflict of Laws*, Section 423, cited by Appellant (App. Br. 13, fn. 37) is clear authority to the contrary for all American courts. It provides as follows:

> "Damages for breach of a contract to deliver money not currency of the state where the delivery is to be made are measured in currency of the state of performance at the rate of exchange current at the time of breach."

In the Comment to this section, the framers of the Restatement point out that a contract to deliver foreign money is really a contract to deliver any commodity (like wheat), and therefore the measure of damages is the same as for breach of a contract to deliver any other chattel. Hence, damages for such a breach are to be measured in American courts just as damages for any other breach – the fair value in dollars at the time of the breach. The definitive law review note on this complex subject, 40 Harv. L. Rev. 619 (1927), written after *Deutsche Bank* indicates that the breach-date rule applies in factual situations such as found in the instant case (fn. 15 at 621) and cites as the leading American authority in point the New York Court of Appeals decision in *Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1923), which did indeed so hold for French francs payable in England. The controlling English cases are in accord,[12]

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[11] "*Arguendo*", since, as Appellant has indicated, *supra*, determination of the United States as the place of performance is warranted. Nonetheless, as Appellant demonstrates in this Argument III B, American performance is irrelevant to a strict view of the *Deutsche Bank-Hicks* holdings, so long as performance *outside of Germany* itself is manifested.

[12] *British American Continental Bank, Goldzieher and Penso's Claim* (1922), 2 Ch. 575; *British American Continental Bank, Lisser and Rosenkranz's Claim* (1923), 1 Ch. 276; cf. *The Celia v. The Volturno* (1921), 2 A.C. 544, H.L.: "If the damages be assessed *in a foreign currency* the judgment here, which must be expressed in sterling, must be based on the amount required to convert the currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account." Lord Buckmaster, J., 2 A.C. at 549. (Emphasis added.)

as are Fraenkel in summarizing the law in "Foreign Money in Domestic Courts"[13] and Professors Williston[14] and Corbin.[15]

At most, the Federal doctrine with regard to the proper rate of conversion for an obligation created under the law of one foreign country and payable in another foreign country could be fairly summarized as a *lacuna* between the factual circumstances of *Hicks,* where a debt created in Germany is payable in the United States, and *Deutsche Bank,* where a debt created in Germany is payable only in Germany. Yet, the clearest possible indications of the intention of the Supreme Court with regard to such no-man's-land between *Hicks* and *Deutsche Bank* lie in the precise holdings of Justice Holmes, the formulator for the Court of *both* rules, indications which point squarely toward the applicability of the *breach day* rule to the instant case.

In *Hicks,* decided (unlike *Deutsche Bank*) by a unanimous Court, the holding is justified as

> "in accord with the decisions of several State Courts and Circuit Courts of Appeals as well as the English House of Lords (authorities cited)." 269 U.S. at 80-81.

Foremost among these authorities cited by the Supreme Court is *Hoppe v. Russo-Asiatic Bank, supra,* along with *The Celia v. The Volturno, supra.* The inference is hence inescapable that both the rule – and the justification – of Section 423 of the Restatement, *Conflict of Laws,* was clearly, and affirmatively, in the mind of the Supreme Court in its dispostion of *Hicks.*

Examining *Deutsche Bank,* the line of Germany's frontiers in the holdings of Justice Holmes is confirmed. There the Court said:

> "[T]he *only* liability that [the bank] incurred by its failure to pay was that which *German* law might impose. . . We may assume that when the Bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by German law – but *we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country.*" 272 U.S. at 519. (Emphasis added.)

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[13] 35 Col. L. Rev. 360 (1935), at p. 389, specifically "no matter in what money payment was due."

[14] 5 Williston, *Contracts* (Rev. Ed. 1937), Sec. 1410 A at p. 3927.

[15] 5 Corbin, *Contracts* (1951), Sec. 1005.

Hence, the Supreme Court was clearly predicating its determination of *Deutsche Bank* on the absence of *any* extrinsic standard in the contemplation of the parties for the valuation of contract damages, so that the judgment day rule be applicable. By inescapable implication Justice Holmes thus made the breach day rule applicable whenever an extrinsic standard can be found to exist in the contemplation of the parties – an extrinsic standard in terms of commodities or in the "currency of another country", not solely where an American dollar measure might be immediately available.

Behind these cases lies a simple rationale, fully applicable to bring this case within the breach day rule. In *Hicks,* the payment of marks in the United States gave the debtor's obligation an extrinsic value, which an American Court could measure in dollars, just as it can measure the value of any other contract obligation. In *Deutsche Bank,* where there was no stipulated standard on which the value of performance might be measured, other than that accorded by the contract under German law, a foreign court could only measure damages in marks valued as of the date of judgment. Here, however, the availability of "extrinsic value" is assured by the requirement of performance outside of Germany. That extrinsic value was the value of Reichsmarks due the Appellant in the place where he was located, where he could bring his debt to judgment in local currency.[16] As a direct result, Dr. Bamberger's claim is considerably broader than any defense under German law, made available by Section 34(a) of the Trading With the Enemy Act, might defeat.

Hence, in this case, no less than *Hicks,* an American court is bound to find the value of Reichsmarks due the Appellant as of the date of breach according to their extrinsic value. Here the economic value of Reichsmarks *in dollars* is made directly available by virtue of the demonstrated nexus of Farben's obligation to the United States, and appropriateness of the breach day rule is thus confirmed.

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[16] It should be pointed out that the *Hicks-Deutsche Bank* rationale thus imposes the risk of currency destruction on the defaulting debtor where the underlying agreement makes his obligation performable outside Germany. Here, such allocation of risk to Farben – which profited mightily at Appellant's expense – would be eminently fair and consistent with the Supreme Court's rationale. See the directly pertinent comment of Professor Corbin: "...[T]he risk of increasing losses, through currency depreciation or otherwise, should generally be borne by the contract breaker." 5 Corbin, *Contracts* 1951 §1005, p. 63-4.

IV. THE GOVERNMENT ENTIRELY MISSTATES GERMAN LAW APPLICABLE TO THE DETERMINATION OF DAMAGES HEREIN IN CONSEQUENCE OF THE 1948 GERMAN CURRENCY REFORM LAW.

Not content with merely attempting to force constricted review of German law questions as "findings of fact" (*supra*, pp. 3-6) the Government similarly seeks to preclude a just and proper determination of those issues by reference to the "controlling and dispositive decision of this Court in *Reissner v. Rogers, supra* . . ." (Gov. Br. 19), and to *Die Deutsche Bank Filiale Nurnberg v. Humphrey, supra* (Gov. Br. 20), as authority for the bearing of German substantive law on this case. The Government errs, however, in arguing that those cases have any relevance whatsoever to the debt claim herein, as it does in its further miscitations of German law with respect to this claim.

A. Both *Deutsche Bank* and *Reissner* Involved Claims Entirely Dissimilar from the Claim at Bar, and Cannot Be Precedent for Its Just and Proper Determination.

Both *Deutsche Bank* and *Reissner* involved claims under German law that on their face are so dissimilar from the Appellant's claim as to be absolutely irrelevant.

Appellant has pointed out (App. Br. 29-37) that, in the words of Appellant's German law expert, Mr. Galleski:

> "Farben owes a value liability ["wertschuld"] to pay so many units of any currency, as are required to make Plaintiff whole." (App. Br. 30, quoting J.A. 115).

The Government's German law expert, Dr. Schoch, is in accord with regard to the nature of Appellant's claim (J.A. 65-66). As such, Appellant's claim is to be considered a variable obligation, including all ascertainable damages for value lost by default. Turning again to Justice Holmes' terse statement of controlling assumptions in *Deutsche Bank*, we find another clear basis for distinguishing that case from the case at bar:

> "[T]he only liability that [the bank] incurred by its failure to pay was that which the German law might impose. . . *We may assume* that when the Bank failed to pay on demand *its liability was fixed at a certain number of marks* – by the terms of the contract and *by German law* – but we also assume that it was fixed in marks

> only, not at the extrinsic value that those marks then had in commodities or in the currency of another country." 272 U.S. at 519. (Emphasis added.)

The debt at issue in *Deutsche Bank* according to German law was an "obligation to pay a fixed sum of money" ("geldsummenschuld") by contrast to the case at bar, and it was by virtue of special German legislation[17] explicitly *not* subject to "revalorization" as a result of inflation. Thus, the judicial colloquy between Mr. Justice Holmes and Sir Frederick Pollock (App. Br. 32, fn. 71) is directly in point: German law did not allow unliquidated damages in *Deutsche Bank* – as it does here – and, thus, the express prohibitions under German law of compensation for Mr. Humphrey's inflation damages is wholly irrelevant here where devaluation damages are expressly *permitted* by German law to Dr. Bamberger. (See App. Br. 35-39)

Nor is *Reissner* any more apposite than *Deutsche Bank*. *Reissner* involved a claim for unjust enrichment, a quasi-contract claim specially created under Section 812 of the German Civil

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[17] It is of critical importance in understanding the meaning of the *Deutsche Bank* case to realize that according to the German Revalorization Law of July 16, 1925, Sections 65 and 66, *Reichsgesetzblatt I* (1925), p. 117, bank balances were specifically exempted from the "revalorization" thereby undertaken to preserve obligations. As summarized in Staudinger's detailed commentary on Section 242 of the German Civil Code:

> "But not to be revaluated are – without prejudice to an agreement to another effect, Section 67, par. 3 – claims based upon 'Kontonkorrent' or some other running account *as well as bank accounts* subject to certain [inapplicable] exceptions (Sections 65, 66). . ." (Emphasis added.) Staudinger-Weber, *Treu und Glauben* (1961), Anno. F 25 to Sec. 242, p. 1263.

Hence, Mr. Humphrey's claim was a "liability . . . fixed at a certain number of marks . . . by German law." *Deutsche Bank, supra*, 272 U.S. at 519.

Moreover, in *Deutsche Bank*, an examination of the brief of the Bank (pp. 9-10; 13-16) gives added dimension to the role which Justice Holmes' assumption played in that case:

> "The claim of the plaintiff in the case at bar has been filed with the [German-American] Mixed Claims Commission for the same sum which he claims in this suit . . .
>
> "The plaintiff's claim, insofar as it is a claim for damages, can and will be allowed in the proceedings before the Mixed Claims Commission."

Ultimately, the Commission entered an award for Mr. Humphrey's inflation damages. which the U.S. Treasury paid on August 29, 1928 (*Reissner v. Rogers, supra*, Joint Appendix pp. 62-70). Hence, for the Supreme Court, the denial of compensation for currency inflation was not intended to dispose of the plaintiff's recovery. Damages for currency collapse *were not at issue in Duetsche Bank.*

Code. In *Reissner*, the Government was able to show that the claimant was hung on the horns of a fatal dilemma: If his claim was simply a claim for unjust enrichment, consequently recognizable as a claim under American law and under the Trading With the Enemy Act, it was not eligible for any readjustment of damages due to devaluation, by virtue of numerous German authorities.[18] If, on the other hand, Reissner could demonstrate that the act of his debtor causing the unjust enrichment was malicious – thereby bringing his claim within the special damage provisions of Section 818, para. 4, and 819, para. 1, of the German Civil Code, which in turn would invoke the making-the-debtor-whole provisions of Sections 285, *et seq* at issue here[19] – then Reissner's devaluation damages could only be a *tort* claim under

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[18] Dr. Schoch, in her Legal Opinion in *Reissner* (where she was the Government's German law expert as well as in this case) precisely and trenchently distinguishes *Reissner* (as it emerged through the grid of the Trading With the Enemy Act) from this case (*Reissner v. Rogers, supra*, Joint Appendix, pp. 125, 128), as follows:

> "Claimant's expert on German law has correctly stated that a claim for damages does not come under the Conversion Law . . . The reason is that such a claim is not a 'Reichsmark debt' within the meaning of the Conversion Law. For although the obligation to pay damages existed at the time of the currency reform, there was no amount fixed in Reichsmarks; since damages are designed to restore the injured party to his former economic position, . . . the amount to be paid is not ascertained until judgment is rendered. . .
>
> "In considering the Conversion Law, German courts have consistently distinguished between claims for damages and unjust enrichment claims. While they denied the applicability of the Conversion Law to damage claims, they have held that unjust enrichment claims are 'Reichsmark debts' within the meaning of Article 16 of the Conversion Law and consequently convertible at the rate of 1:10. [Numerous citations and footnotes containing citations omitted.] "

[19] In its brief in *Reissner*, the Government thus expressed its views on German and American law, which apparently underlay the Court's holding (*Reissner v. Rogers, supra*, Government's Brief 22-24):

> ". . . We suggest that the application of Section 34 to Reissner's claim should turn on the classification American law would give the claim, which would depend upon the basis or ground of liability and the rule of damages. . .
>
> "The liability of Schering which the Hearing Examiner found depends upon Sections 818 (par. 4), 819, 288, 289, and 290 of the Civil Code. . . Such a liability is for an intentional and conscious wrong ('knows of the absence of legal ground at the time of the receipt' (Sec. 819; . .)). In such a case there may be 'further damage' (Sec. 288; . .), 'damage arising from the default' (Sec. 289; . .) . . .
>
> "The liability the Hearing Examiner found arose from the conscious and intentional taking advantage by Schering of a Jewish persecutee. That was a fact but it does not follow that

(Continued on Page 18)

American law, *clearly beyond the plain meaning of "debt claim" under the Trading With the Enemy Act.* *Reissner v. Rogers, supra,* 276 F. 2d at 513.

This claim is *not* an unjust enrichment claim, either simple or based on malice. Dr. Bamberger's claim is a claim for payment of a money debt under a contract. The remedial sections of the German Civil Code – Sections 286 and 288 – are thus fully applicable to make the debtor whole, and, for a simple contract claim under American law, there is nothing in the Trading With the Enemy Act to bar the full payment that German law would allow.

B. The Government Seeks to Demolish Appellant's Arguments with Respect to German Rules Exempting Debt Claims Such as This from Devaluation by Repeated Miscitations of the Authorities Relied on by Appellant.

Appellant's arguments with respect to the requirements of German law exempting claims such as this from devaluation – in which the Government's own legal expert fully concurs (J.A. 65) – have been attacked by the Government in four instances of miscitations of law.

1. The Government contends (Gov. Br. 21-22) that the decision of the Federal Supreme Court of July 10, 1954, 14 BGHZ 212, "fully supports the Custodian" in his contention that this claim is subject to devaluation. That case, which arose out of a compromise of a *tort* claim, held only that payments of an annuity arising from an accident, due after 1948, be made along principles of restitution of damages (which, if any way relevant here, surely supports *Appellant's* view) and struck down payment of any fixed formula amount in favor of

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19 (Continued)

> the liability was a 'debt' under Section 34. In American law such a wrong would be wanton, malicious, gross or oppressive wrong, a tort, and because it was such a wrong would give the victim a right to recover exemplary or punitive damages. . . The wrong would be a tort, not one in contract or for unjust enrichment, and the damages would not be measured by the rule applicable to cases of contract or unjust enrichment. . .
>
> ". . . There was a transfer under circumstances which gave rise to a claim for unjust enrichment, which would be a 'debt' under Section 34. There is, however, no authority under Section 34 for assertion of a tort claim, and, on principle, there should not be, since 'debt' in both Section 9(a) [of the predecessor, post-World War I statute] and Section 34 has always been held by the courts as sounding in contract. . . [citations omitted]"

a return which will "equalize [the plaintiff's] loss of earnings. . ." The conversion of payments accruing before 1948, the only possible point of real relevancy between that case and this, was, as the Government admits, a closed book, by agreement of counsel not at issue in that case (Gov. Br. 21), and hence, of no applicability whatsoever to this case.

2. The Government's long exegesis on the basic law of contract damages (Gov. Br. 22-23) has the vice of gratuitous simplicity: It serves no purpose in the Argument except to set the stage for a misleading construal of the scope of Section 286 of the German Civil Code. As the Government rightly states (Gov. Br. 23):

> ". . . it is significant that the general remedy for breach of contract under German law is specific performance. Money damages are the exception rather than the rule."

Yet that distinction seems to be lost, significant though it be, in presenting the Annotation No. 2 to Section 286, BGB, of the Judges of the Reichsgericht and Bundesgericht (Gov. Br. 25), wherefrom the Government would have the Court conclude as follows:

> "The measure of damages for non-performance consist [sic] of payment of the principal Reichsmark debt plus statutory interest, and those damages are convertible at the rate of 10 Reichsmarks to 1 Deutsche Mark." (Gov. Br. 26)

That conclusion is fallacious, as reference to the structure of the relationship between Sections 286 and 288, and a close reading of the quoted Annotation, make clear. Section 286, as the Government points out, relates to "the general remedy for breach of contract under German law" – specific performance. According to the quoted Annotation, a creditor *whose obligation is susceptible of specific performance,* may sue for specific performance plus damages for delay, or, *in the alternative,* for non-performance. There is, also, the remedy of Section 288, specially pertinent to a *money debt,* whereunder a creditor is entitled to interest and "the assertion of further damages is not precluded." The quoted Annotation, wrenched from context, relates *only* to the treatment of those obligations where, the option of specific performance being forgone, damages[20] must be sought. Hence, by

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[20] With respect to the interesting linguistic problem raised by the Government in disputing the translation of the German term "Verzugsschaden" with reference to Section 286, which the Appellant translated "default damages" but the Government in this instance chooses to translate "damages for delayed [or late] performance," the Government has perhaps improved its translations, as well as its views on German law, Dr. Schoch, in her affidavit, consistently speaks with reference to Section 286, of "damages caused by his [the creditor's] default." J.A. 63-64.

a purely sophistic emphasis on the election of remedies *within* Section 286. the Government attempts to create the false illusion that there is an election of remedies *between* Sections 286 and 288.[21] Most significantly, the unique argument that the Government now makes would appear to be totally lost on its own German law expert, Dr. Magdalena Schoch, who flatly concluded (J.A. 65) with regard to Appellant's claim:

> "(1) that at the date of vesting, under its contract with the claimant, Farben owed the claimant a sum of money in Reichsmarks; and (2) that in addition claimant is entitled to 4 percent interest on this debt for any period during which Farben was in default *and for any additional damages that claimant can prove."*(Emphasis added.)

3. The Government's final refutation of Appellant's authorities with respect to the exemption from devaluation of his claim – and presumably its most emphatic and important rebuttal – is in fact its most blatant misciation. It omits to quote a key passage in the Appellant's citation (App. Br. 31) from Palandt, *Commentary on the German Civil Code* (21st Ed. 1962), Annotation 2(b), to Section 286, p. 257, solely to achieve a result that the Government says, "states exactly the opposite" of the Appellant's thesis, "that damages for non-payment of Reichsmark debts were not subject to conversion." (Gov. Br. 27). *By changing punctuation in translation* (from ". . ." to ".", in place of a semicolon), *and omitting an immediate, detailed and total qualification,*[22] the Government does, indeed, transmute Palandt's annotation into an authority that "states exactly the opposite." The Government is clearly and emphatically wrong.

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[21] In fact, if one can even envision specific performance of a *money* debt, Section 286 offers Appellant two avenues to the recovery he should also receive under 288 that, by virtue of the quoted Annotation, are alternatives *to each other.* If he is still "interested in the debtor's performance", he may sue for the thing (money) and the "Verzug" – delay – damages (since performance is long past due, and the debtor has willfully refused to perform) or he may, being "no longer interested in the debtor's performance," sue to have the thing "converted" into money, recovering full damages for non-performance "*in lieu of* the claim for specific performance". (Gov. Br. 25)

[22] The full and correct translation of the quoted reference from Palandt follows, first in English and then in German, with the pertinent sections omitted by the Government italicized:

> "To the extent that the claim was for money, it was subject to conversion if it arose prior to the currency reform, since the debtor could have paid it in Reichsmarks. A genuine "value liability" was not created." ; *refer in this regard to the prenotation to Sec. 249 Note 9.– The creditor can also demand compensation for the damage caused by the devaluation of the money as far as the default has been a cause.* [Citation omitted] *Similarly, the defaulting debtor must bear the damage resulting from the currency reform in 1948. . .*"

(Continued on Page 21)

4. Appellant has contended that, as royalties, the bulk of his claim is specifically exempted from coverage of the 1948 German Currency Reform Law as an accounting between co-venturers recognized as a partnership claim under German law (App. Br. 33-35) and exempt from devaluation by the currency stabilization provision in the Farben-Bamberger agreement buttressed by equitable interpretation under German law (App. Br. 35-36). The Government makes no refutation whatsoever that Appellant has a valid partnership claim under German law and that under German law such claims are exempt from devaluation. These contentions must therefore be taken as admitted.[23]

The Government does, however, make faint efforts to discredit Appellant's claim as being beyond the purview of the Trading With the Enemy Act. It offers no authority in support of its contention, other than to state that –

> "No reported case under Section 9(a) [the predecessor of Section 34] allowed a partnership distribution as a 'debt.' " (Gov. Br. 28) –

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[22] (Continued)

> "Soweit der Anspruch auf Geld ging, unterlag er, wenn vor der Währungsreform entstanden, der Umstellung, da der Schuldner ihn in RM hätte abdecken Können. Ein echter Wertanspruch liegt nicht vor . . . . ; *vgl dazu Vordem v. § 249 E 9 – Der Glaub kann auch den Geldentwertungschaden ersetzt verlangen soweit dieser auf Verzug zuruckzufuhren ist . . . . Ebenso muss der in Verzug befindl Schuldner den Schaden aus der Wahrungsumstellung 1948 tragen. . .*"

The prenotation referred to above reads as follows, first in English, and then in German:

> ". . . With regard to the currency reform in 1948 it follows therefrom that the damage claim, even though it has to be discharged in money, is not subject either to the conversion at the ratio of 10:1 or to the one of 1:1 under the conversion law (Western Zones), to the extent that the damage was not compensated for prior to the effective date of the currency reform, but seeks such amount of money as is necessary to compensate for the damage as of the time of the judgment; for the reason that the claim is a value liability ["wertschuld"] and not a liability for a fixed sum of money ["geldsummenschuld"]." At page 202.

> "Für die Währungsreform 1948 folgt daraus, dass der Schad Ersunspr, aucht soweit er in Geld zu leisten ist, weder der Umstellg 10:1 noch der 1:1 nach dem UmstG (Westzonen) unterliegt, soweit der Schaden am WährStichtag noch nicht beseitigt war, sondern Auf den Geldbetrag geht, der im Urteilszeitpunkt zur Schadenbeseitigg nötig ist; denn der Anspr ist Wertschuld, nicht Geldsummenschuld. . ."

[23] Though *exemption* arises from legislatively and judicially sanctioned equitable principles, the nature of Dr. Bamberger's claim as a contract debt under *German* law is, of course, not thereby affected. Contrast *Reissner v. Rogers, supra.*

and other similar irrelevancies. Similarly, it maintains that:

> "under Section 34 the only claims that have been recognized by the courts have arisen out of express contracts. . . or quasi-contract in the sense of unjust enrichment. . ." (Gov. Br. 29)

To the extent that the Government establishes thereby that the absence of authority for the Appellant's contention is authority to the contrary, it is clearly wrong. Partnership distributions under American law settle "claims which arose out of contract" (Gov. Br. 28) in exactly the same sense as any other claims recognized by the Trading With the Enemy Act. The elementary proposition that a partnership is a contract needs no citation.

V. THIS COURT CAN FIND FOR THE APPELLANT ACCORDING TO FOUR PROVEN LEGAL THEORIES, WHILE TO SUSTAIN THE GOVERNMENT'S ACTION WOULD BE TO ACHIEVE AN UNJUST RESULT BY TORTURED CHOPPING OF LOGIC AND LAW.

When all is done, the central truth of this case remains: almost thirty years ago, the Appellant provided services to Farben, for which Farben never paid. The United States Congress has made a solemn commitment to recompense the Appellant, and others like him, for the defaults of their Nazi debtors, but the Government offers to pay no more than one-sixteenth of the admitted value of the Appellant's services.

In the wreckage of war and the salvage of peace, it may well be that many have suffered far more than Dr. Bamberger, who after all, has escaped with his life. But if any claimant under the Trading With the Enemy Act ever urged a sound and persuasive case upon the American courts for the full recovery that Congress ordained it is the claimant here. This court can rule for the Appellant according to four clearly drawn legal theories, any one of which is sufficient to sustain his case, as well as upon a fair and broad view of the equities of this case.

1. Under a narrow and literal interpretation of the holding of the United States Supreme Court in *Hicks v. Guinness, supra*, Appellant is owed recovery of his RM 160,637.92 at its full, undevaluated dollar equivalent as of the date of breach. Appellant's contractual relationship with Farben explicitly and implicitly envisioned performance in the *United States* of his obligation not to compete with Farben upon termination of active employment, an obligation that Dr. Bamberger admittedly performed. Moreover, paramount equitable principles in German law, fully

supported by applicable case law, compel the determination of the place of performance of the Farben-Bamberger contract to have been, in part, in the United States, where the circumstances of war, oppression, and Farben's breach placed Dr. Bamberger.

2. Construing the rules of *Hicks* and *Deutsche Bank* together, any *lacuna* that may exist in Federal case law as to the proper date of conversion for damages from default of a debt arising under the law of one foreign country, payable in another foreign country, must be resolved in favor of a breach-day conversion because of the Supreme Court's implications in *Hicks* and *Deutsche Bank,* and holdings of other American and English courts. Consequently, even discounting the clear contractual requirement for performance of the Farben-Bamberger obligation in the United States, the breach-day rule applies since the requirement of performance outisde of Germany is undeniable.

3. Under German contract law, assuming *Deutsche Bank* applies, Dr. Bamberger is entitled to be made whole as a result of damages from Farben's breach, by the testimony of all German law experts in this case. Consequently, to the extent that the 1948 German Currency Reform Law would devalue Appellant's claim as a "debt obligation" within its scope, German law of damages would restore his claim to its full value, in Deutsche Marks if you wish. If the judgment day rule applies, an American court must award Dr. Bamberger the dollar-equivalent of the judgment he would today receive in Germany, full value of his claim.

4. The preponderant bulk of Appellant's claim, for royalties from Farben's exploitations of his inventions in partnership with Dr. Bamberger – RM 131,562.92 – is wholly free of any defense to full payment, under German law and the Trading With the Enemy Act. The Government has not contested that Farben owed Dr. Bamberger for the fruits of a valid partnership under *German* law, and that such a claim is specifically exempt from the force of the 1948 German Currency Reform Law and equitable principles applicable to the currency stabilization provision of the Farben-Bamberger contract. Since a debt arising from a partnership contract is absolutely indistinguishable from any other contractual debt under *American* law, full value for the partnership share of Dr. Bamberger's claim (converting Reichsmarks to Deutsche Marks at 1:1 rate, and Deutsche Marks into dollars) must be awarded to Dr. Bamberger.

In Appellant's briefs to this Court, these four avenues to the same result have been articulated, for the first time fully before any tribunal. In opposition, the Government's case emerges as

the spinning of an archaic prayerwheel of legal conclusions never fully tested and now shown to be wholly inapplicable to these facts. In sum, the Government has urged upon this Court an unjust result, achieved by logical and legal avenues that have long lain in the shadows.

Appellant has argued that, in the last analysis, to uphold the Deputy Director's decision would be to frustrate justice and lend sanction of an American court to a discriminatory confiscation (App. Br. 39-43).[24] The Government has not even attempted to refute this obvious result, despite a bold denial that devaluation here would be confiscation. Instead, it has artfully sought to frame the issues before this Court in a false guise, solely to defeat this Court's review. This artifice contravenes the principles laid down in *Miller v. Robertson,* 266 U.S. 243 (1924), which the Government cites for a less lofty purpose (Gov. Br. 28), but whose uncompromising righteousness the Government has always herein sought to ignore:

> "The just purpose of the section [the predecessor of Section 34(e)] is not to be defeated by a narrow interpretation." 266 U.S. at 248

This Court, with regard to this case, is under no compunction so to do, as the Supreme Court has only recently emphasized in *Honda v. Clark,* 386 U.S. 484 (1967), where the Court stressed again the curative mandate of the Trading With the Enemy Act[25] (App. Br. 45-6). As indicated by the Appellant, "this case is a unique one before this Court." (App. Br. 1) As such, it should, in the last analysis, be viewed by this Court in the light

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[24] As well as one specifically beyond the intention and power of the Federal Republic of Germany pursuant to its treaty obligations as interpreted by the German courts. (Arg. IV-A, App. Br. 37-39)

[25] In *Honda,* the Supreme Court was careful to rearticulate the limited nature of the interest of the U.S. Government in Trading With the Enemy Act recoveries – as a stakeholder, not as an interested party: "*The Government has no interest in the fund* except to enforce the primary Congressional mandate that bona fide creditors recover their due." 386 U.S. at 500. (Emphasis added.) Contrast intimations to the contrary in *Reissner v. Rogers, supra,* 276 F. 2d at 513, and Judge Washington's concurring opinion in *International Silk Guild v. Rogers, supra,* 262 F. 2d at 226.

of all the factors that compel Dr. Bamberger's full recovery under both American and German law. The presence in this case of ample legal grounds for full restitution makes undevalued recovery both an eminently desirable and readily achievable result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief (printed)were delivered, by hand, this 21st day of November, 1967, to Bruno A. Ristau, Esquire, Room 3613, U. S. Department of Justice, Washington, D. C., Attorney for Appellee.

Joseph H. Sharlitt

Joseph H. Sharlitt

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,991

CURT BAMBERGER, Appellant,

v.

RAMSEY CLARK, Attorney General
of the United States, Appellee.

ANSWER TO PETITION FOR REHEARING

In an astonishing exercise in which the Government turns its back on its own administrative Findings of Fact, disavows its own position in the Court below and before this Court, and articulates an argument never before heard, it now strikes out on a new tack to neutralize this Court's clear determination that Dr. Bamberger's entitlement in Reichsmarks be converted to dollars at the pre-war rate of conversion.

Appellee, in its Petition for Rehearing, requests "clarification" of the Opinion of this Court, dated January 30, 1968; but this request is simply a guise. The substance of the request is that the Government seeks to reverse its field and try its luck anew with this Court.

Throughout this case, the Government has taken the position that "under the law of Germany, I. G. Farbenindustrie was, at the time of the vesting of its property in the United States, indebted to claimant in the principal sum of RM 160,637.92" (Decision of the Deputy Director, J. A. 313; Petition, p. 3). Now, for the first time in this case, the Government asserts that 54,741.60 Reichsmarks of that sum awarded Dr. Bamberger by the OAP's Deputy Director as due and owing when Farben's properties were vested on March 15, 1942

> "had not become payable at the time of the vesting of Farben's property in March of 1942" (Petition for Rehearing, p. 4)

Thus the Government attempts to strike from the clear terms of this Court's Opinion some 54,741.60 Reichsmarks, which allegedly

> "matured and became payable in 1942-45--after the vesting of Farben's assets" (Petition for Rehearing, p. 5)

Apparently, the Government now--for the first time in this entire litigation--wishes authority to segregate these 54,741.60 Reichsmarks and convert them at an unnamed rate, but presumably a rate that would be far more favorable to the Government than the rate decreed by this Court.

Appellant respectfully opposes this effort on the part of the Government, to seek one more avenue to defeat

appellant's claim, and urges the Court to deny the Petition.

I. THIS COURT'S HOLDING IS ENTIRELY CLEAR AND DISPOSITIVE

A. There is no lack of clarity in this Court's Decision.

Until last week the issue before this Court was solely the conversion of a specific and never-before questioned award of RM 160,637.92 found by the Deputy Director to be owing to Dr. Bamberger as of the date of vesting. This issue was formulated by the Court accepting the Government's own postulates:

> "Accepting the Government's position that the critical question under Deutsche Bank v. Humphrey and Hicks v. Guinness is where the payment under the breached contract was to be made, and that the answer to this question is to be found by resort to German law, appellant argues that under German law Farben was obliged to pay him in the United States as of the crucial date in September 1941" (Slip Opinion, p. 3; emphasis supplied).

In accordance with the issues so framed, the Court held, as the Government had conceded in its Brief,[1/] that Farben had breached its contractual obligations so to pay Dr. Bamberger.

1/ "The claim" (Dr. Bamberger's) "arose out of the breach of an employment contract between the appellant and the pre-vesting owner of the assets I. G. Farbenindustrie Aktiengisellschaft of Germany ('Farben')." (Government Brief, p. 6)

The extent of Farben's breach was also clearly indicated by the Court:

> "Since the employment contract was non-severable we do not consider it significant that of this amount [the 160,637.92 RM], 18,000 reichsmarks was to compensate appellant for honoring the covenant not to compete." (Slip Opinion, footnote 2, p. 3; emphasis supplied)

It cannot be doubted that this Court thus determined (as admitted by the Government) that Farben had committed a breach of its contract with Dr. Bamberger before he reached the United States in 1941.[2/] Moreover, since the Court

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2/ This Court's recounting of Farben's termination of Dr. Bamberger in 1939 is found at page 2 of the Slip Opinion. The Government's own Finding of Farben's defaults (its failure to pay sums due Dr. Bamberger) beginning in February of 1939 is set forth in the OAP Deputy Director's decision (J. A. 308-311).

Although no speculation is required to flesh out what this Court has done so thoroughly, Dr. Bamberger could obviously have sued for breach of contract in an American Court immediately upon his arrival here in 1941 citing Farben's persistent default of Farben since 1939 as an anticipatory breach of his contract. His measure of damages in such a suit, in 1941, would be any damage that he could prove to flow from this breach. Under Section 34 the Government itself has always measured these damages as 160,637.92 RM. This right to sue in 1941, alleging anticipatory breach, is by no means academic since the very purpose of Section 34 is to give Dr. Bamberger as adequate a substitute remedy as he would have had if vesting had not taken place. (See Legislative History quoted at page 46, App. Br.)

specifically held that Farben's obligations were non-severable, it is equally clear that the Court found that Dr. Bamberger was entitled to damages resulting from the totality of Farben's breach as of that date, including royalties as well as salary, non-competition compensation, and the return of pension contributions. Thus, the Court necessarily concurred in the Government's own determination that the measure of Dr. Bamberger's damages was 160,637.92 RM, and it found

> ".....under Hicks v. Guinness, supra, that the reichsmarks debt was to be converted into dollars at a 1941 rate of exchange." (Slip Opinion, p. 6)

Thus the premises of the Court's Opinion and its holding are clear, even without reference to the Government's own persistent framing of the issues (see IB infra) and no further clarification should be required.

B. The Court's decision is, moreover, premised on the Government's own Findings and Representations throughout this proceeding--that Farben owed Dr. Bamberger 160,637.92 RM as of the date of vesting, March 15, 1942. This sum includes and has always included the 54,741.60 RM belatedly protested by the Government.

This history of the 160,637.92 RM award, which always included the 54,741.60 RM and which no one doubted until now, reveals the Government's Petition to be a last-ditch effort to frustrate Dr. Bamberger's recovery.

That award in Reichsmarks, at the insistence of the Government, was always restricted to and included only those amounts due and owing prior to Farben's vesting on March 15, 1942. The Statute ordained this[3], and the Deputy Director's decision complied with this limitation.

In at least five separate stages in this proceeding--extending over five years of litigation--the Government has always--without exception--represented just this.

1. In the OAP's own administrative proceeding, the OAP's own Claims Unit[4] recited in its Brief to the Chief Hearing Examiner that Dr. Bamberger had made certain claims for post-vesting (post-March 15, 1942) royalties, but stated that:

> "Since Section 34 of the Trading With the Enemy Act, as amended, provides that only debts that were due and owing on the date that the debtor's property was vested may be allowed and paid by this office, the additional 1944 and 1945 royalties may not be included since they were not due and owing on the vesting date of March 15, 1942. Accordingly, it is the position of the Claims Unit that Farben's maximum debt to claimant under Section 34 of the Act for the use of his inventions subsequent to January 1, 1938 is the gross sum of RM 87,523.20 as set forth in Point 2 of its principal brief." (Reply Brief of Chief of Claims Unit, dated March 29, 1963, J. A. 21 before this Court)

3/ "No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting." (Trading With the Enemy Act, Section 34, 50 App. USC 34)

4/ Whose position adverse to Dr. Bamberger is clearly reflected by its determination that Dr. Bamberger should be awarded overall $2,817.61. (Reply Brief of Chief of Claims Unit dated March 29, 1963)

That this sum of RM 87,523.20, fixed by the OAP's own Claims Unit as the entire sum due for pre-vesting (pre-March 15, 1942) royalties, included the RM 54,741.60 RM in question as pre-vesting royalties is clear from the first page of that same Brief (J. A. 19 herein). Moreover, all doubt is removed by the Deputy Director's own specific finding that the RM 87,523.20, incorporated as part of his award, included the RM 54,741.60. (See specific findings of the Deputy Director, J. A. 310)

2. The same RM 87,523.20 was incorporated by the Hearing Examiner in his Finding 19 (J. A. 292), made on August 27, 1963, wherein the total sum due and owing Dr. Bamberger was placed at RM 160,637.92.[5/]

3. The Findings of the Deputy Director of the Office of Alien Property, dated March 29, 1965--the determination challenged in this action--lay all sniping to rest. He knew well that no award could be made for post-vesting royalties:

> "Section 34 of the Act, however, does not authorize consideration of compensation of tort claims, but only claims for debts which existed prior to vesting of the debtor's property. If the claim is not for such a debt, it is not cognizable under the Act." (J. A. 307; emphasis supplied)

5/ Indeed, the Hearing Examiner, in Finding 19 spoke of Farben owing RM 160,637.92 "At the time that military government took control of Farben in 1945", but neither he nor the Deputy Director found that any part of that sum was allocable to the period after March 15, 1942; in fact, the Deputy Director made specific findings to the contrary (see p. 7, infra).

His ultimate finding could not have been clearer:

> "2. Under the law of Germany, I. G. Farbenindustrie was, at the time of the vesting of its property in the United States, indebted to claimant in the principal sum of RM 160,637.92." (J. A. 313; emphasis supplied)

Now the Government would actually have this Court believe that both its Hearing Examiner and its Deputy Director committed error, flaunted the statute and violated their oaths as public officials by knowingly making awards not permitted by law. The repeated clear, open-eyed findings of these same officials, however, refute, and not one finding anywhere in this record supports, this belated and shocking contention.

4. In the District Court, the Government admitted the allegation in Dr. Bamberger's Complaint that he was due and owing RM 160,637.92 "as of the time that these damages became a liability of the Defendant under Section 34 of the Trading With the Enemy Act." (Paragraph 5 of Dr. Bamberger's Complaint, J. A. 54; Paragraph 5 of Government's Answer, J. A. 59,[6/] dated June 22, 1965.)

In its Memorandum in Support of its Motion for Summary Judgment, dated October 26, 1966, the Government flatly stated:

6/ The Government went further; it admitted in the same paragraph the allegation of Paragraph 5 of the Complaint that "To this point" (viz., the 160,637.92 RM) "no controversy exists between the parties."

"There is no controversy between the parties as to the material facts..." (Government's Memorandum, p. 3)

"After finding that the Plaintiff was entitled to recover on the ground that Plaintiff's claims against Farben was (sic) a proper 'debt' claim, the Custodian determined the principal amount of the indebtedness to be Reichs Marks 160,637.92. The Plaintiff does not challenge this finding in the instant review proceedings." (Ibid, p. 3)

Nor did the Government at any time--until one week ago.

In its Statement of Material Facts (as to which there must be no genuine issue pursuant to Rule 9(h) of the Rules of the District Court), the Government listed post-1938 (not post-vesting) royalties as being uncontested[7], and then stated[8]:

"13. The Office of Alien Property held (R. 141) that Farben was indebted to Plaintiff in the principal sum of Reichs Marks 160,637.92, computed as follows:

...Post-1938 royalties 87,523.22

The administrative finding as to the amount of the principal indebtedness is not challenged by the Plaintiff in the instant proceeding (Complaint paragraph 4(d))." (Emphasis supplied)

What the Government now would tell this Court is that this position before the District Court was wholesale dissembling on its part.

7/ Paragraph 10 therein.

8/ In paragraph 13

5. Before this Court, as recently as October 1967, the Government was equally explicit in representing the 160,637.92 RM (containing the 54,741.60 RM now contested) as being lawfully awarded and beyond contest:

> "Finding that appellant's claim against Farben was a proper 'debt' claim (J. A. 313), the Custodian determined the principal amount of the indebtedness owed by Farben to the appellant to be Reichsmarks 160,637.92 (J. A. 306, 313). This determination is not challenged by the Appellant." (Gov. Br., p. 3)

The Government uttered not a breath, either in its Brief or in Argument, that any part of that sum constituted post-vesting funds due Dr. Bamberger. That would, indeed, have been a shocker because any such articulation would simply have argued, ipso facto, the award to that extent unlawful. Against its own, now ironic, backdrop of assertion that the Deputy Director's decision contained findings of fact not reviewable by this Court (Gov. Br. i, 7, 8, 10, 13 and 18), the Government submitted its case for decision.

Now that the Decision of this Court has gone against it on the question of the rate of conversion, the Government seeks to recant its litany of assertions that Dr. Bamberger's damages, for the purpose of this suit, amount to RM 160,637.92, so as to reduce the amount of recovery. Those reiterated assertions provide ample basis for this

Court's award, which should need no clarification, least of all to the Government. This Court's opinion is abundantly clear. The facts on which it rests are and were not only clear to the Government, they were found by the Government itself, and never contested by it.

II. UNDER THESE CIRCUMSTANCES REHEARING IS WHOLLY IMPROPER AND INEQUITABLE

It is submitted by the Undersigned that if ever the Government was bound as a matter of law to anything it is bound to the sanctity of the 160,637.92 RM award it made in this case, which award included the 54,741.60 RM described in its Petition, and which award was made in the form of a Finding of Fact by the Government's own officer with the specific determination that it represented a "debt" owed by Farben "at the time of the vesting of its property in the United States" (Deputy Director's decision, J. A. 313). Indeed five years of representations by the Government administratively and before two Courts should lead to finality and not a desperate attempt to undo all of what has been adjudicated to date.

Federal Courts traditionally bar the propounding of "such weathervane arguments which shift with the winds of

necessity", Georgia-Pacific Plywood Co. v. U. S. Plywood Corp., D.C.N.Y., 148 F. Supp. 846, 856, reversed on other grounds, C.A., Georgia-Pacific Corporation v. U. S. Plywood Corp., 258 F. 2d 124, cert. den. 79 S. Ct. 124, 358 U.S. 884, 3 L. Ed. 2d 112; "playing fast-and-loose" with the Courts, Scarano v. Central R. Co., C.A. Pa., 203 F. 2d 510; and trifling with judicial proceedings, Livesay Industries, Inc. v. Livesay Window Co., C.A. Fla., 202 F. 2d 378, 382, cert. den. Livesay Window Co. v. Livesay Industries, Inc., 74 S. Ct. 70, 346 U. S. 855, 98 L. Ed. 369. Such an estoppel may be worked against the Government in appropriate cases,[9/] as should be the case here. Vestal v. C.I.R., C.A.D.C., 1945, 152 F. 2d 132, 80 U. S. App. D. C. 264; Interstate Fire Ins. Co. v. U. S., E. D. Tenn., 1964, 215 F. Supp. 586, and cases cited at 599, aff'd C.C.A. 6th, 339 F. 2d 603; Waldman v. U. S., C. A. Mass., 1956, 229 F. 2d 99, U. S. v. Denver & R.G.W.R. Co., C.C.A. Utah, 1926, 16 F. 2d 374; U. S. v. Hanna Nickel Smelting Co., 253 F. Supp. 784.

Moreover, the Government, by failing to voice until now its present argument--wholly inconsistent with the prior

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9/ Here, of course, no considerations of sovereign immunity are present, since the Government is only a "stakeholder"--Honda v. Clark, 386 U. S. 484 (1967)--to limit the Government's openness to estoppel.

position from which it had, until now, benefited--as to the proper breach date at prior stages of this proceeding, has long ago waived and lost whatever standing it might have had to spin merit from its sophistry, and cannot now secure rehearing of a proceeding that, but for its own relentless delay, should have been terminated long ago. See O'Neal v. U. S., C. A. 10th, 1957, 240 F. 2d 700, 702, and cases cited; U. S. v. Wurtsbaugh, C. A. 5th, 1944, 140 F. 2d 534, 537-8 and Alabama Great Southern R. Co. v. Johnson, C. A. 5th, 1944, 146 F. 2d 968, 970-973. Compare also, Rule 17(g) of the Rules of this Court.

Questioning the Government's liability for 54,741.60 RM, which the Government now seeks to voice by innuendo, is thus a field of argument wholly barred to it. Appellant believes that a grant of rehearing on this spurious issue would consequently be not only improper but, at this late date, highly inequitable.

III. THE GOVERNMENT'S PETITION ON ITS FACE REFUTES THE GOVERNMENT'S BASIS FOR REHEARING

In its Petition, the Government

> "....request[s] that the Court clarify its mandate to show that the 1941 Reichsmark dollar exchange rate is not applicable to that part of the principle debt which matured and became payable for the first time in the years 1942-45." (Petition for Rehearing, p. 6)

But in total contradiction, it states that the Custodian in this case deemed that all 160,637.92 RM were due and owing as of March 15, 1942, the date of vesting:

> "The Custodian's conclusion was predicated on an established administrative interpretation of Section 34 that where a claimant establishes a continuous obligation to make periodic payments on the part of the pre-vesting obligor, the Custodian would treat such future liabilities, for purposes of debt claims, as 'due and owing at the time of ....vesting'."

This clairvoyant insight into the workings of the Deputy Director's mind--which could only spring from an acknowledgment of the rights of claimants like Dr. Bamberger to sue for anticipatory breach--wholly aborts this attempt at reargument since it admits an established administrative practice followed by the Deputy Director under which the entire 160,637.92 RM were deemed a pre-vesting obligation.

Hence, all grounds for rehearing dissolve, since it is abundantly clear that the Government, from the outset

of this proceeding and for reasons fully acceptable to it, has undertaken to pay Dr. Bamberger's 160,637.92 RM pre-vesting damages. This Court having determined the appropriate rate of exchange for these admitted damages into dollars, there are no further issues to be determined in achieving the long-awaited termination of this litigation. 10/

IV. THE MANDATE

While the appellant has no objection to appellee's request that the mandate of this Court be amended to charge the District to determine the amount due the appellant (Petition, Point 1, pp. 1-2), such is surely not a valid reason for granting rehearing of this cause.

The statute appears to justify this amendment. Understandably, too, Dr. Bamberger abhors further agency delay and tinkering with this case. He seeks the earliest

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10/ In the more than twenty-three years of this dispute, before the Government's own administrative officers and two Courts, the United States has never conjured up any rate other than the 40¢ rate applicable to conversion as of the date of Farben's breaches. It makes no such contention in its Petition for Rehearing, since it knows from its own official records that it cannot successfully contest the applicability of a 40¢ rate. Therefore, even on the fanciful hypothesis that some of the 160,637.92 RM were not due Dr. Bamberger until after vesting, the Government's contention here is meaningless.

possible implementation of this Court's decision by the District Court.

Appellant hence concurs with the Government that the mandate should be amended to delete any reference back of this cause from the District Court to the Office of Alien Property.

CONCLUSION

In summary, the Petition for Rehearing should be denied because:

(1) The Court's Opinion is adequately clear and consistent with positions consistently taken by the Government throughout this litigation;

(2) It would be improper and inequitable for the Court to reopen the proceedings to consider a contention by the Government wholly in conflict with the position taken by it administratively and before both Courts on review;

(3) The Government's request for Rehearing is refuted by admissions found on the face of its own Petition.

Appellant has no objection to the Government's request that the mandate of this Court be amended to provide for a final disposition of this cause in the District Court in conformity with this Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Answer to Petition for Rehearing were mailed, postage prepaid, this 23rd day of February, 1968, to Bruno A. Ristau, Esquire, Room 3613, U. S. Department of Justice, Washington, D. C., Attorney for Appellee.

Joseph H. Sharlitt